

1 Manuel A. Wagan
 2 E-30055, 530-2-26 Low
 3 Post Office Box 9
 4 Avenal, CA 93204

5 In Pro Per

6
 7
 8
 9
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

FILED
 FEB 22 2008
 RICHARD W. WIEKING
 CLERK U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 540

IN THE UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Manuel A. Wagan

) Case No. **CV 08**

1082 (PR)

Petitioner,

) PETITION FOR WRIT OF MANDATE/PROHIBITION
 AND DECLATORY RELIEF AND POINT OF
 AUTHORITY. 28 U.S.C.A. §1651 (a)(b)

v.

SAN MATEO COUNTY SUPERIOR COURT

Respondent,

CALIFORNIA ATTORNEY GENERAL

Real Party in Interest.

I

INTRODUCTION

1. Petitioner, Manuel A. Wagan, petition this Court for a Writ of Mandate/ Prohibition directed to the San Mateo Superior Court (case No. C-20837) San Mateo county, State of California, and by this verified petition, represents that: This action challenges the unconstitutional and illegal Life sentence imposed to the Petitioner by the San Mateo superior Court (hereinafter Respondent) without a separate conviction of willful, deliberate, and premeditated element of the life crime as required mandatorily and separately of Penal Code § 664(a), §189 & CALJIC 8.67; *In re Winship*, 90 S.Ct. 1068 (1970) ("Proof beyond reasonable doubt is required to establish guilt of criminal charge.") U.S.C.A. Const. Amend. 14 (Constitutional safeguard of proof beyond reasonable doubt is as much required during

008-00837 WHA

1 adjudicatory stage of...like adults, are constitutionally entitled
 2 to proof beyond reasonable doubt when they are charged with violation
 3 of criminal law. U.S.C.A.Const. Amend. 14. (Record Transcript
 4 hereinafter RT 1098: 11-16, 1099:26-1100:1-2 "C"). Petitioner
 5 was never been separately convicted of willful, deliberate, and
 6 premeditated element of attempted murder allegation. Therefore,
 7 Petitioner's Life sentence that was unconstitutionally and illegally
 8 imposed. Petitioner's conviction of "Frist Degree Attempted Murder"
 9 a noncrime in California or is no such crime. (See People v. Bright,
 10 12 Cal.4th 652; People v. Macias (1982) 137 Cal.App.3d 471-472;
 11 Apprindi v. New Jersey 530 U.S. 466; Cunningham v. California 2007
 12 U.S. LEXES 1324.) See also EXHIBIT "I Cal. Court of appeal's order
 13 February 27, 2007, Case No. 116465 - the court confirmed the
 14 following:

15 "The court has obtained the record on appeal and has
 16 confirmed that the verdict forms do not contain a finding
 17 that the attempted murder was willful, deliberate, and
 premeditated."

18 The facts of these case is undisputed that the jury verdict do
 19 not contain a finding that the attempted murder was willful, del-
 20 iberate, and premeditated and the respondent imposition of Life
 21 sentence was clearly unconstitutional and illegal under the law and
 22 the Constitutiona of the United States under the 14th Amendment.
 23 The Respondent failed and contenue to fail to comply with the
 24 requirement of PC § 664(a) & CALJIC 8.67 that the LIfe sentence
 25 shall not be imposed unless the petitioner was found guilty separately
 26 by the jury of prmeditated allegation an element of the life crime.

27 Respondent also violated petitioner's 8th Amendment's right
 28 against cruel and unknewsual punishment when the respondent uncons-
 titutionally and illegally imposed Life sentence without a conviction

of willful, deliberate, and premeditated allegation an lement of the life offense as required mandatorily by Cal. Penal code §664(a) and CALJIC 8.67 that the jury must make a separate finding of true in the premeditation allegation. Dent v. West virginia, 129 U.S. 114, 123 (1899); Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("The touchtone of due process is the protection of the individual against arbitrary government action.) The Respondent has proceeded in excess of Jurisdiction and denied petitioner a fair trial and abuse its authority when respondent has not proceeded in the manner required by the statute and law because the life sentence that the Respondent imposed to petitioner is not supported by the jury's finding. The Petitioner's "Attempted First Degree murder" conviction a noncrime in California. (See EXHIBIT "A" Jury Verdict and EXHIBIT "I" February 27, 2007 order Case No.A116465.) People v. Bright, 12 C.4th 652; In re Winship, supra, Id. at 1068.

2. Petitioner respectfully request that his conviction and life sentence be reversed and that a judgment of acquittal be entered as to Count 1 and count 2 and Petitioner be discharge forthwith.

II
PARTY

PETITIONER

3. Manuel A. Wagan (hereinafter Petitioner) is currently illegally and unconstitutionally been incarcerated in violation of the Constitution of the United States under the 14th Amendment and 8th Amendment for 19 years now in Avenal State Prison.

RESPONDENT

4. San Mateo Superior court is responsible to the illegal and unconstitutional life sentence that was imposed without a convicting petitioner of willful, deliberate, and premeditated allegation. Petitioner's conviction fo "Attempted first degree murder a noncrime in California.

1 III
2STATEMENT OF THE CASE

3 5. On January 19, 2007, Petitioner filed a Petition for Writ
4 of Mandate/Prohibition. On February 27, 2007, the California Court
5 of Appeal order the Respondent to filed oppsition. See EXHIBIT "I".

6 6. On March 9, 2007, Respondent filed opposition to Petition
7 for Writ of Mandate, citing People v. Villegas (2001) 92 Cal.App.4th
8 1217, 1223. Respondent contend that "Like first degree murder",
9 attempted first degree murder requires a finding of premeditation
10 and deliberation." This is not true and unconstitutional that
11 violated petitioner's right to due process under the United States
12 Constitution 5th, 8th and 14th Amendment. ~~See Exhibit "I"~~ See EXHIBIT "J"

13 7. On March 19, 2007, Petitioner send his Reply and it was
14 filed on 3/22/2007. (See EXHIBIT "K" 1st Appellate District Docket
15 - Register of Actions and 3/23/07, order denying relief.)

16 8. On March 23, 2007, the Court Of Appeal Order denying petition
17 for writ of mandate/request for counsel is denied. EXHIBIT "K".
18 Petitioner is a Filipino male that came here in the US when he was
19 21 years old and english is his second language that he only learn
20 when he got here. Since, the Court order is written in the english
21 language petitioner did not understand if the order is just a denial
22 of counsel or denial of petition, so, Petitioner wrote a letter
23 dated April 12, 2007, requesting clarification of the March 23, 2007,
24 denial order in petitioner's writ proceeding. Specifically, Peti-
25 tioner asked if the denial order was denying the entire writ pet-
26 ition or just petitioner's request for appointment of counsel and
27 the court Clerk explained that the above order denied petitioner's
28 petition as well as petitioner's request for appointed counsel. (See

1 EXHIBIT "L" Court of Appeal's April 20, 2007, letter to the Court.)
2 Since, the 10 days time has already past petitioner filed an
3 Original Writ Petition instead of Petition for Review, and was denied
4 relief by the California Supreme Court. (See EXHIBIT "N" Case No.
5 S153547 .) California Supreme Court ordered denying relief 7/26/07.

6 9. On August 23, 2007, Petitioner filed a Petition for a Writ of
7 Certiorari and placed on the docket August 29, 2007 as No. 07-6191
8 and was denied on November 2007. (See EXHIBIT "O" .)

9 10. Petitioner had filed Petition for Writ of Habeas Corpus in
10 the San Mateo County Superior Court and asking the Respondent to
11 vacate Petitioner's unconstitutional and illegal Life sentence and
12 was denied relief without evidentiary hearing on June 13, 2001.
13 Petitioner filed Petition for Writ of Habeas Corpus in the California
14 Court of Appeal and was denied relief without reason, on Aug. 9, 2001
15 . And Petitioner filed Petition for Writ of Habeas Corpus in the
16 California Supreme Court and was denied relief on May 1, 2002, citing
17 In re Clark 5 C.4th 750. (See EXHIBIT "D" for all the State Court
18 Habeas Corpus denial of relief.)

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

//

FACTS

11. On July 25, 1989, Petitioner was convicted of "Attempted
First Degree Murder (a noncrime in California) in violation of PC
§§ 664/187, (See EXHIBIT "A") and other charges. (See a copy of the
Abstract of Judgment sheet case no. C-20837 attached hereto as
EXHIBIT "B".)

12. Petitioner was never been convicted of willful, deliberate
, and premeditated attempted murder an element of the life crime.

13. Petitioner's Jury Verdict provide the following:

11 "We the jury in the above entitled cause, find the
12 defendant, Manuel A. Wagan (AKA: Manuel Atienza Wagan
13 , GUILTY, of the crime of first degree attempted murder
in violation of Penal Code sections 664/187, as charged
in Count 1 of the Information." (See EXHIBIT "A")

14. The California Court of Appeal (case no. 116465.) confirmed
15 that the "Verdict forms do not contain a finding that the attempted
16 murder was willful, deliberate, and premeditated." (See EXHIBIT "I"
17 case no. 116465.)

18. However, at sentencing, on September 14, 1989, respondent
19 purported to imposed an unconstitutional and illegal Life sentence
20 with the possibility of parole under subdivision (a) without convict-
21 ing Petitioner of willful, deliberate, and premeditated element of
22 the life crime.

23. On Sept.17, 1990, Petitioner's appeal was affirmed. (See
24 EXHIBIT "G" Wende Brief) Petitioner filed several habeas petition
25 and all been denied by the State Court. (Citing In re Clark 5 C.4th
26 750, 774, (See EXHIBIT "D".) Superior Court, Appeal's Ct. & Cal.S.Ct.
27 denial.)

V

POINT AND AUTHORITY IN SUPPORT

OF PETITION FOR WRIT OF MANDATE/PROHIBITION

17. The San Mateo sentencing judge had no jurisdiction and no authority to imposed a life sentence to Petitioner Wagan because he was never been convicted separately of willful, deliberate, and premeditated element of the life crime. The California Court of Appeal confirmed that the "Verdict forms do not contain a finding that the attempted murder was willful, deliberate, and premeditated." (See EXHIBIT "I" case no. 116465.)

18. Petitioner's Jury Verdict provide the following:

"We the jury in the above entitled cause, find the defendant, Manuel a. Wagan (AKA: Manuel Atienza Wagan , GUILTY, of the crime of attempted first degree murder in violation of Penal Code section 664/187, as charged in Count I of the Information." (See Petition EXHIBIT "A" Jury Verdict.)

19. Compare to the Jury Verdict of People v. Hammer Case No. 96FU3016 in the Sacramento Superior Court (See EXHIBIT "F".) in his verdict the jury clearly convicted Hammer of premeditated attempted murder as required mandatorily by the PC § 664, subdivision (a). Hammer's jury verdict provided the following:

"We, the in the above entitled cause, find the defendant , Jeremia Gene Hammer, GUILTY of the crime of violation of sections 664/187(a) of the Penal Code of the State of California (attempted murder) as charged in count One of the information."

"We, the jury in the above entitled cause, find that defendant, Jeremiah Gene Hammer, DID X commit this crime willfully, and with premeditation and deliberation. (See EXHIBIT "F" Hammer's Verdict form and see also KHAN 's Verdict form, FAATILIGA's Verdict form, SMITH's Verdict form.)

20. California Penal Code § 664, subd. (a), Attempt, Punishment provided in pertaining part:

1 "...If the crime attempted is willful, deliberate and
2 premeditated murder as defined in section 189, the
3 person guilty of that attempt shall be punished by
4 imprisonment in the state prison for life with the
5 possibility of parole...the additional term provided
6 in this section for attempted willfu, deliberate and
7 premeditated murder SHALL NOT be imposed unless the fact
8 that the attempted murder was willfu, deliberate, and
9 premeditated is admitted or found to be true by the trier
10 of fact." (Emphasis Added.)

11 21. Both California and Federal Jurisprudence recognice that
12 question fo jurisdiction may be raised at anytime, and cannot be
13 waived by Petitioner. Fraytag v. Commission of Internal Revenue, 50
14 U. S. 868, 896, 11 S.Ct. 2631 (1991) discussing the "None waivebabi-
15 lity" of lack of subject matter jurisdiction.

16 22. The statute and case law as extablished by the Legislature
17 and the United States Supreme Court to be followed to give respondent
18 guideline for the imposition of a crime punishment.

19 23. The federal and state Constitution require that a jury
20 decide each element of a crime beyond a reasonable doubt. The Cali-
21 fornia Penal code § 664(a) and CALJIC 8.67 required that the jury
22 find that willful, deliberate, and premeditated attempted murder have
23 existed beyond a reasonable doubt before San Mateo sentencing judge
24 can impose a life sentence to the petitioner. The Due Process Clause
25 of the Fourteenth Amendment of the United States Constitution in In
26 re Winship, 397 U. S. 358, 90 S.Ct. 1068 (1970), held that due
27 process requires that all elements of a crime be proved beyond a
28 reasonable doubt. Thus, the Respondent violated Petitioner's due
process when it imposed a life sentence to the Petitioner without a
conviction of willfu, deliberate, and premeditated attempted murder.
"Expressions in many opinion of the United States Supreme Court indi-
cated that it ahs long been assumed that proof of a criminal charge

beyond a reasonable doubt is constitutionally required. See, for example, *Miles v. United States*, 103 U.S. 304, 312, (1881); *davis v. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 358; *Holt v. United States*, 218 U.S. 245, 253, 31 X.Ct. 2, 6; *Wilson v. United States* 34 S.Ct. 347, 349, 350; *Brinegar v. United States* 338 U.S. 160, 174, 69 S.Ct. 1302, 1310 (1949); *Leland v. Oregon*, 343 U.S. 800, 803, 72 S.Ct. 1009, (dissenting opinion). In a similar vein, the Court said in *Brinegar v. United States*, supra 338 U.S. at 174, 69 S.Ct., at 1310 that "guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the constitution, has crystallized into rules of evidence consistent with that standard . These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property," *Davis v. United States*, supra, 160 U.S., at 488, 16 S.Ct. at 358 state that the requirement is implicit in constitutions * * * (which of life and liberty." In *Davis* a murder conviction was reversed because the trial judge instructed the jury that it was their duty to convict when the evidence was equally balanced regarding the sanity of the accused. This Court said: "On the contrary, he is entitled to an acquittal of the specific crime charged, if upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime. * * * is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." *Id.*, at 484, 493, 16 S.Ct., at 357, 360. "Due process commands that no man shall lose his liberty unless the Government has borne the

1 the burden of * * * convincing the factfinder of his guilt." To
 2 this end, the reasonable-doubt standard is indispensable, for it
 3 "impresses on the trier of fact the necessity of reaching a subjective
 4 state of certitude of the facts in issue." *In re Winship*, supra
 5 , at 1072. **See also Cal. Penal Code Section 664, subd. (a).**

6 Moreover, use of the reasonable-doubt standard is indispensable
 7 to command the respect and confidence of the community in applications
 8 of the criminal law. It is critical that the moral force
 9 of the criminal law not be diluted by a standard of proof that
 10 leaves people in doubt whether innocent men are being condemned. It
 11 is also important in our free society that every individual going
 12 about his ordinary affairs have confidence that his government cannot
 13 adjudge him guilty of a criminal offense without convincing a proper
 14 factfinder of his guilt with utmost certainty." *Id.*, at 1073.

15 24. Petitioner's conviction of "Attempted first degree murder"
 16 (See EXHIBIT "H" - Habeas Case No. 99F06604.)
 17 (PC §§ 664/187) a non crime in California was a direct violation of
 18 Petitioner's liberty interest under the "Due Process clauses" of the
 19 14th Amendment of the U. S. constitution. The mandatory language of
 20 PC § 664(a) and CAJIC 8.67 mandatorily required the Court to have
 21 the jury find petitioner guilty of Attempted murder and after that
 22 the jury must make a separate finding mandatorily if the Petitioner
 23 is guilty of attempted willful, deliberate, and premeditated murder.
 24 The California Court of Appeal confirmed that the "Jury Verdict" do
 25 not contain a finding that the attempted murder was willful, deliberate
 26 and premeditated." (See EXHIBIT "I").

27 25. California case law recognize way back in 1977 that the
 28 crime of attempted murder is not in fact divided into degrees. See
 People v. Wien (1977) 69 Cal.App.3d 79, 93; People v. Macias (1982)
 137 Cal.App.3d 471-472; People v. Bright (1996) 12 C.4th 652. The

1 jury does not decide the truth of the premeditation allegation until
2 it first has reached a verdict on the substantive offense charged.
3 Bright, *supra*, at 662. Petitioner was acquitted of attempted murder
4 was convicted of a noncrime of "Attempted first degree murder."
5 Petitioner was also acquitted of premeditation allegation of the life
6 crime. The California Supreme Court concluded that the determination
7 whether an offense is divided into degree lies exclusively within the
8 power of the legislature, and that such a legislative determination
9 cannot be altered or otherwise affected by the description of the
10 offense contained in the charging document or by the form in which
11 the verdict is received. Bright, *supra*, at 660. Under California
12 Penal Code § 664(a), attempt to commit murder as a single offense
13 (See EXHIBIT "E" - CALJIC 8.66.)
14 (under CALJIC 8.66) rather than one of degrees and distinguished the
15 premeditation allegation (under CALJIC 8.67) as SEPARATE from the
offense. See Bright, *supra*, 657.

16 26. "No one may be required at peril of life, liberty or property
17 to speculate as to the meaning of penal statutes. All are entitled
18 to be informed as to what the state command or forbids. See *Lanzeta*
19 v. New Jersey (1939) 306 U.S. 451, 453, Court cannot go so far as to
20 create an offense by enlarging a statute, by inserting or deleting
21 words, or by giving the terms used false or unusual meaning."
22 "The principle of nulla poena sine lege (no punishment without law)
23 is fundamental to American jurisprudence. All crimes must be enacted
24 by a legislature and written down in statutory law. California
25 Courts are not allowed to create new criminal offenses." (See, e.g.,
26 *In re Brown* (1973) 9 Cal.3d 612 624 ("In California all crimes are
27 statutory and there are no common law crimes....Deletion by the court
of one of the statutory requirements of a crime would make conduct
criminal which the Legislature has not seen fit to make criminal and

1 violate the fundamental principle that there are no common law crimes
 2 in this state."; *Keeler v. Superior Court* (1970) 2 C.3d 619, 631-632
 3 (power to define crimes and fix penalties is vested exclusively in
 4 the legislative branch, and here are no common law crimes in Cali-
 5 fornia); Penal Code § 6 (the only acts cognizable as crimes in
 6 California are those defines in the Penal code and the statutes
 7 which were specifically preserved by it); *People v. Bean* (1989) 213
 8 Cal. App.3d 639, 646 ("there is no power in courts of this state to
 9 enact penal laws).

10 DUTY OF THE RESPONDENT UNDER THE LAW

11 27. In *re Sandel*, (1966) 64 Cal.2d 412, the California Supreme
 12 Court stated that "a court can correct illegal sentence on its own
 13 motion." *People v. Serato*, *supra*, (1973) 9 Cal.3d 753, 764 "The
 14 People may file a petition for Writ of Mandate to correct an illegal
 15 sentence on its own motion."

16 28. Respondent has a clear and present duty to correct petitioner's
 17 unconstitutional and illegal sentence (that violated his 14th
 18 and 8th Amendment right under the United States Constitution.) and
 19 Respondent contenes failure to correct petitioner's sentence will
 20 cause petitioner and his family erreperable harm.

21 PETITIONER CANNOT WAIVE HIS CLAIM

22 29. Both California and Federal jurisprudence recognize that
 23 questions of jurisdiction may be raised at anytime, and cannot be
 24 waived by petitioner. *Fraytag v. Commission of Internal Revenue* 50
 25 U.S. 868, 869, 11 S.Ct. 2631 (1991) discussing the "None waiveability"
 26 of lack of subject matter jurisdiction.

27 30. On September 17, 1990, Petitioner's appeal was affirmed.
 28 (See a Copy of appellate denial attached hereto as EXHIBIT "G".)

31. Dispite the most recent habeas petition files by petitioner

1 asking the Respondent to correct petitioner's sentencing error
2 respondent has failed and contenue to fail to comply with their duty
3 under California Penal Code § 664, subdivision (a), CALJIC 8.67;
4 In re Winship, supra , 90 S.Ct. 1068. (See EXHIBIT "D" - Superior
5 Court, Appellate court, and California supreme court Denial.)
6 (See also California court of appeal's Denial withou reason EXHIBIT
7 "M".)

8 32. Petitioner filed a Petition for Writ of Mandate/Prohibition
9 in the Court appeal, First Appellate District, Division Two Case
10 No. A117934 and was denied on June 5, 2007.

11 33. Petitioner filed a Petition for Review in the California
12 Supreme Court and was denied on July 26 2007. EXHIBIT "N".

13 34. Petitioner filed a Writ of Review in the United States
14 Supreme Court and was denied relief without reason. See EXHIBIT "O".

15 35. Despite this Writ of Mandate/Prohibition and Habeas petition
16 and demand, Respondent has failed and continues to fail to comply
17 with their mandatory ministerial duty under the Cal. Pen. Code § 664
18 (a), CALJIC 8.67, United States Constitution 8th, and 14th Amendment
19 ; In re winship, 90 S.Ct. 1068.

20 36. Petitioner are without further speedy remedy in the ordinary
21 course of law for respondent's failure to carry out the above men-
22 tioned requirement.

23 VI

24 FIRST CAUSE OF ACTION: WRIT OF MANDATE

25 37. Respondent has a clear, present and mandatory ministerial
26 duty to comply with the requirements of the statute because Petitio
27 ner was never been convicted of willful, deliberate, and premeditated
28 attempt murder allegation as required by the Cal. PC § 664(a) &

1 CALJIC 8.67 that life sentence must not be impose unless the jury
2 find petitioner guilty of premeditated allegation an element of the
3 life crime. In re Winship, *supra*. U.S. Constitution 8th and 14th.

4 38. Petitioner's conviction of "First degree Attempted murder
5 a noncrime in California statute and at all times relevant herein
6 respondent has had and contenues to have mandatory duty and abilities
7 to do so.

8 39. Notwithstanding these duties and abilities, respondent has
9 failed and refused and contenue to fail to perform his/her mandatory
10 duty as required by the above state statute, law and the Constitution
11 of the United States 8th and 14th Amendment.

12 40. Petitioner and his family are suffering irreperable harm
13 for 19 years now and no plaine, speedy and adequate remedy in the
14 ordinary course of the law to compel respondent to comply with the
15 Cal. PC §664(a) & CALJIC 8.67, Cal. Const., art., 1, §§7(a), 14
16 and the U.S. Const., 8th and 14th amendments requirements thereby
17 rendering this Court's peremptory writ of mandate appropriate in
18 that:

19 a) Petitioner will contenue to suffer as long as respondent
20 fails to comply with the requirements of the PC § 664(a) & CALJIC
21 8.67, Cal. Const., art. 1, §§7(a), 14 and U.S. Const., 8th and 14th
22 Amendments; Macias *supra* at p. 471-472; Bright *supra*, at p. 664;
23 In re Winship, *supra*., 90 S.Ct. 1068 (1970, "Held that due process
24 requires that all elements of a crime be proved beyond a reasonable
25 doubt." Wagan had a liberty interest in a sentence at or below this
26 statutory maximum set by statute of conviction because, absent a
27 finding of willful, deliberate and premeditated, the San Mateo County
28 sentencing judge had no authority to impose a life sentence.

VII

SECOND CAUSE OF ACTION: DECLARATORY RELIEF

41. An actual controversy has arisen and now exists between Petitioner and Respondent relating to their respective rights and duties in that Petitioner contend that the unconstitutional illegal Life sentence imposed to Petitioner by the Respondent without a conviction of willful, deliberat, and premeditated allegation must follow the requirements of Cal. Penal Code § 664(a) & CALJIC 8.67, Cal. const., Art., 1, §§ 7(a), 14, and the U.S. Constitution 8th, and 14th Amendment and states and federal law. In re Winship, supra, 90 S.Ct. 1068 (1970). Whereas Respondent by their failure to so comply contends in all respect to the contrary.

42. The Respondent has proceeded in excess of jurisdiction; whether there was a fair trial, abuse of discretion is established if the Respondent has not proceeded in the manner required by law, the order or decision is not supportd by the findings. The Court shall enter judgment either commanding respondent to set aside the order of judgment. Petitioner request to exercise its power to decide the actual controversy between the Petitioner and the Respondent because the respondent has refused or failed to do so and to hear and rule on the merits of all matters properly within its jurisdictional discretion. Petitioner request also to set aside or vacate petitioner's Life sentence because it was unconstitutional and illegally imposed to Peititioner without a convition of willfu, deliberate, and premeditated attempted murder allegation as required by the Cal. Penal Code §664(a) & CALJIC 8.67; In re Winship, supra. and order respondent to declare aquital because petitioner was convicted of a noncrime of Attempted First deegre murder.

1 43. Petitioner contend that the Respondent imposed an unconstitutional
2 and illegal Life sentence because the Petitioner's conviction
3 of "First degree attempted murder a noncrime in California and
4 its beyond the statutory mandate of PC § 664(a).

5 44. Petitioner seek a declaration that respondent has a mandatory
6 ministerial duty that required to comply with the requirement
7 that life sentence must not be imposed unless the jury finds that
8 willful, deliberate and premeditation allegation was found true
9 separately as required by Cal. Penal Code § 664(a) & CALJIC 8.67,
10 Cal. const., Art. 1, §§ 7(a), 14, 17, and the U.S. Constitution 8th
11 , 14th Amendment; Macias, supra, at 471-472; Bright, supra Id. at
12 page 664; In re Winship, supra, 90 S.Ct. 1068. And vacate Petitioner's
13 unconstitutional and illegal Life sentence and remand Petitioner
14 for re-sentencing and order the respondent to order Petitioner
15 aquited because petitioner's conviction of "First degree attempted
16 murder a noncrime in California. Bright, supra, Id at 652; "no
17 punishment without law" see In re Brown supra, Id at 624; Keeler,
18 supra Id. at 531-532; Lanzetta v. New Jersey (1939) 306 U.S. 451,
19 453. Courts cannot go so far as to create an offense by enlarging
20 statute, by inserting or deleting words, or by giving the terms used
21 false or unusual meanings. Keeler, 2 Cal.3d at 632.

22 45. Petitioner seek the court declaration that petitioner's
23 conviction of "First degree attempted murder a noncrime in California
24 and without the separate conviction of willful, deliberate, and
25 premeditated allegation as required by PC § 664(a) & CALJIC 8.67
26 and that no punishment without law for petitioner's conviction of
27 "First degree attempted murder. In re Brown, supra Id at 624; Keeler
28 supra Id at 531-532; Bean supra at 646.

VIII

PRAYER FOR RELIEF

Petitioner is without plain, speedy or adequate remedy in the ordinary course of law, wherefore, petitioner pray:

1. That the Court declare that respondent's imposition of the unconstitutional and illegal Life sentence to the petitioner without a separate conviction of willful, deliberate, and premeditated attempted murder allegation is in violation of the requirements of California Penal Code § 664(a), CALJIC 8.67, People v. Bright, supra, Id. at 664; Macias supra, Id. at 471-472, In re Winship, supra Id. at 1068 and the 14th Amendment of the Constitution of the United States and petitioner's life sentence is violation of his 8th Amendment right against cruel and unusual punishment.

2. That the court declare Petitioner's conviction of "First degree attempted murder" is a noncrime in California and that the Court declare that no punishment without law for petitioner's conviction of "First degree attempted murder."

3. That the Court declare that respondent violated petitioner's "due process" right under the 14th Amendment of the U.S. Constitution.

4. That the Court issue its Alternative Writ of Mandate commanding the respondent to vacate petitioner's unconstitutional and illegal Life sentence that imposed to petitioner without a conviction separately of willful, deliberate, and premeditated attempted murder allegation as required mandatorily by PC § 664(a) & CALJIC 8.67, and order respondent to remand petitioner for resentencing and declare petitioner aquited of willfu, deliberate and premeditated attempted murder and order respondent to comply to the requirements of the statute and law, and order to show cause before the Court

1 at a specified time and place why respondent has not done so.

2 5. That on the hearing of this petition and respondent's
3 return thereto, if any, the court issue its peremptory writ of
4 mandate on its own motion, and until respondent complies with the
5 law.

6 6. That the court appoint counsel to protect petitioner's
7 right by professional presentation and in the interest of justice.
8 Petitioner is indigent and cannot afford to hire counsel.

9 7. That the court issue an order an Order to show Cause and in
10 making the OSC decision, the Court must assume all facts are true.

11 8. That the Court issue an order allowing for expansion of the
12 record if it cannot make the determinations required based upon the
13 record petitioner has provided.

14 9. That the Court issue a briefing schedule.

15 10. That after briefing is complete, the Court grant an eviden-
16 tiary hearing on any unresolve factual issues.

17 11. That the Court issue any other orders it deems necessary
18 to resolve the issues in dispute.

19 13. That the Court grant such further relief as if deems just
20 and proper in the interest of justice so required.

21 DATE: FEBRUARY 8, 2008

22 Respectfully submitted,

23 
24 Manuel A. Wagan, In Pro Per

VERIFICATION

I, Manuel A. Wagan, I am the petitioner in the above entitled action, I have read the foregoing Petition for Writ of Mandate/ Prohibition and Declaratory Relief and AFFIDAVIT and know the contents thereof; the same is true of my own knowledge, and I make this verification because the facts set forth in the petition are within my knowledge.

I declare under the penalty of perjury that the foregoing is true and correct.

EXECUTED on FEBRUARY 8, 2008, at Avenal CA.

~~Manuel A. Wagan~~. In Pro Per

1 PROOF OF SERVICE

2 I, Manuel A. Wagan, declare as follows:

3 I am over 18 of age, a party hereto, and on the below listed
4 date, I served the within document by inserting same into lawful
course of United States Mail at Avenal, CA. from which place there
is regular and lawful postal communication with the recipient below
designated, postage prepaid, addressed as follows: DOCUMENT

5 PETITION FOR WRIT OF MANDATE/PROHIBITION
6 AND DECLATORY RELIEF, AFFIDAVIT AND POINT OF
7 AUTHORITY IN SUPPORT OF THE PETITION

8 NOTICE TO FILE RETURN within 30 days after service

9 PARTY SERVED:

10 1. DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

455 Golden Gate Ave., San Francisco, CA 94102

11 2. SAN MATEO SUPERIOR COURT - Respondent

FOR THE COUNTY OF SAN MATEO

MAIN COURTHOUSE

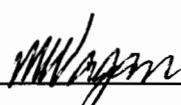
HALL OF JUSTICE 400 COUNTY CENTER

REDWOOD CITY, CA. 94063-1655

RUNDE, JOHN W.....PRESIDING JUDGE, Div/Dept 15 (650) 363-4815.

15 I declare under penalty of perjury that the foregoing is true
16 and correct, have for portion alleged on information and belief,
which portions I believe are true.

17 EXECUTED: Avenal, CA., this 8 day of FEBRUARY 2008.

18
19
20 
Manuel A. Wagan, In Pro Per

AFFIDAVIT OF TRUTH
IN SUPPORT OF WRIT OF MANDATE/
PROHIBITION AND DECLATORY RELIEF

IN THE UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NOTICE) ss

Indeed no more than an AFFIDAVIT is necessary to make a PRIMA FACIE CASE, United State v. Kiss, 658 F.2d. 526 (7th Cir. 1981) Cert. Denied 50 U.S. L. W. 2169; SCT. March 22, 1982

1. Affiant is competent to state the matters set forth herein.
2. Affiant has personal knowledge of the facts stated herein.
3. Affiant herein sayth, the facts stated herein are true, correct, and complete, admissible as evidence, and if called upon as a witness affiant will testify to their veracity.
4. AFFIANT does swear and affirm that the contents in this affidavit is in accordance with the best of affiants first hand knowledge and conviction such are true, correct, complete, and not misleading the truth, the whole truth, and nothing but the truth. Do "ffiant Declare under penalty of perjury.
5. That the Affiant sayth, that uncontroverted allegations deemed true; no matter in answer deemed controverted. Every material allegation of the complaint or cross-complaint, not controverted by the answer, shall, for the purpose of the action, be taken true.
6. That the Affiant sayth, that the San Mateo County Superior Court imposed an unconstitutional and illegal Life sentence without a separate conviction of willful, deliberate, and premeditated element of the life crime as required mandatorily and separately of Pena Code § 664(a), §189 & CALJIC 8.67; In re Winship, 90 S.Ct. 1068 (1970) ("Proof beyond reasonable doubt is required to establish guilt of criminal charge." U.S.C.A. Const. Amend. 14 (Constitutional safeguard of proof beyond reasonable doubt is as much required during adjudicatory stage of...like adults, are constitutionally entitled to proof beyond reasonable doubt when they are charged with violation of criminal law. U.S.C.A. 14.
7. That the Affiant sayth, that Affiant conviction of "First degree attemp-ted murder" a noncrime in California. (See People v. Bright, 12 Cal.4th 652; People v. Macias (1982) 137 Cal..App.3d 471-472; Apprendi v. New Jersey 530 U.S. 466; Cunningham v. California 2007 U.S. LEXES 1324.)

- 1 8. That the Affiant sayth, that the San Mateo County Superior
2 Court violated affiant "Due process" right under the U.S.
3 Constitution 14th Amendment when it imposed a life sentence
4 without a conviction of willful, deliberate, and premeditated
5 attempted murder.
- 4 9. That the Affiant sayth, that the San Mateo County Superior
5 Court violated affiant 8th Amendment right against cruel
6 and unusual punishment of the U.S. Constitution when it impose
7 a life sentence with a possibility of parole without a separate
8 conviction of willful, deliberate, and premeditated attempted
9 murder as required by the California Penal Code §664(a), §189,
10 & CALJIC 8.67, In re Winship, supra, 90 S.Ct. 1068.
- 11 10. That the Affiant sayth, that the Life sentence with the possi
12 bility of parole that illegally and unconstitutionally imposed by
13 the San Mateo County Superior Court is in excess of the Cou
14 rt's jurisdiction because affiant was never been separately
15 convicted of willful, deliberate, and premeditated attempted
16 murder as a mandatory duty of the Court under PC §664(a), §189
17 , and CALJIC 8.67.
- 18 11. That the Affiant sayth, that the affiant conviction of "First
19 degree attempted murder is void because first degree attempted
20 murder is not a crime in California state and law. People v.
21 Bright, supra, Id. at p. 664, 688; Macias supra, Id. at 471-472
22 , People v. Cooper 53 Cal.3d 771, 832.
- 23 12. That the Affiant sayth, that murder itself is divided into
24 degrees, and the crime of attempted murder is not divided into
25 degrees. People v. Wein 69 Cal.App. 3d 79 ,93, Bright, supra,
26 at 664, 677, Macias, supra, at 471-472.
- 27 13. That the Affiant sayth, that Cal. Pen. Code §664(a) as define
28 in section 189 states in mandatory language "The additional
29 term provided in this section for attempted willful, deliberate
30 , and premeditated murder Shall not be imposed unless the fact
31 that the attempted murder... is admitted or found to be true
32 by the trier of fact."
- 33 14. That the Affiant sayth, that CALJIC 8.67, states in mandatory
34 language "...That in the event the jury found defendant (Affia
35 nt) guilty of attempted murder, it Must determine Separate
36 -ly if the premeditation allegation was True. You will inclu
37 de a special finding on that question in your verdict, a form
38 that will be supplied for that purpose. The people have the
39 burden of proving the truth of this allegation."
- 40 15. That the Affiant sayth, that the people did not met their
41 burden of proof because the jury didnot find affiant guilty
42 and the jury did not make the mandatory separate finding of
43 willful, deliberate, and premeditated attempted murder. The San
44 Mateo Superior Court violated affiant due preceess right unde
45 r the 5th, 6th, 8th, and 14th Amendment when the Court imposed

1 an illegal life sentence because affiant was not found guilty of
2 premeditated attempted murder and the jury did not make a
3 separate finding as required mandatorilly by CALJIC 8.67, PC
4 §664(a).

- 5
- 6 16. That the Affiant sayth, that the San Mateo County Superior
7 Court has a mandatory ministerial duty to comply with the PC
8 §664(a) and CALJIC 8.67, Bright supra, at 664, Macias, supra,
9 at 471-472, Apprindi, supra at 466.

10 Every material allegation of a compaint not controverted by
11 answer must, for purposeof action, be taken as true, and no
12 evidence need be introduced in support of such allegation.

13 FURTHER Affiant sayth not.

14 I declare under penalty of perjury that the foregoing is true
15 and correct.

16 /s/ Manuel Atienza Wagan
17 Manuel Atienza Wagan
18 In Pro Per

19 AFFIANT DATE: FEBRUARY 8, 2008.

JIS-44 (Rev. 3/99)

CIVIL COVER SHEET

The JIS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Manuel A. Wagan

KINGS

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)DEFENDANTS SAN MATEO SUPERIOR COURT
FOR COUNTY OF SAN MATEO

SAN MATEO

County of Residence of First Listed

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

 1 U.S. Government Plaintiff 3 Federal Question
(U.S. Government Not a Party) 2 U.S. Government Defendant 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State 1 1 Incorporated or Principal Place of Business In This State 4 4Citizen of Another State 2 2 Incorporated and Principal Place of Business In Another State 5 5Citizen or Subject of a 3 3 Foreign Nation Foreign Country 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury—Product Liability	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 380 Other Personal Property Damage		<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 385 Property Damage Product Liability		<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability			<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury			<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability				<input type="checkbox"/> 892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence		<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	Habeas Corpus:		<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 530 General		<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty		<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 446 Other Civil Rights	<input checked="" type="checkbox"/> 540 Mandamus & Other		<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 550 Civil Rights		
		<input type="checkbox"/> 555 Prison Condition		
(PLACE AN "X" IN ONE BOX ONLY)				

V. ORIGIN

1 Original 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

PETITION FOR WRIT OF MANDATE/PROHIBITION 28 U.S.C.A. §1651(a)(b)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER CV-99-3098-WHA

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFF JUDGE MAG. JUDGE

ORIGINAL

CIVIL COVER SHEET
(Reverse Side)FTER COMPLETING THE FRONT SIDE OF FORM JS-44C, COMPLETE THE INFORMATION REQUESTED BELOW.II(b). RELATED CASES: Have any cases been previously filed that are related to the present case? No Yes**CV-99-3098-WHA**

Ref. list case number(s):

VII. CASES ARE DEEMED RELATED IF A PREVIOUSLY FILED CASE AND THE PRESENT CASE:

HECK ALL BOXES A. Appear to arise from the same or substantially identical transactions, happenings, or events;IF APPLICABLE B. Involve the same or substantially the same parties or property; C. Involve the same patent, trademark or copyright; D. Call for determination of the same or substantially identical questions of law, or E. Likely for other reasons may entail unnecessary duplication of labor if heard by different judges.C. VENUE: List the California County, or State if other than California, in which EACH named plaintiff resides (Use an additional sheet if necessary)
CHECK HERE IF THE US GOVERNMENT, ITS AGENCIES OR EMPLOYEES IS A NAMED PLAINTIFF.**SAN MATEO SUPERIOR COURT FOR THE COUNTY OF SAN MATEO**

ist the California County, or State if other than California, in which EACH named defendant resides. (Use an additional sheet if necessary).

CHECK HERE IF THE US GOVERNMENT, ITS AGENCIES OR EMPLOYEES IS A NAMED DEFENDANT.

ist the California County, or State if other than California, in which EACH claim arose. (Use an additional sheet if necessary)

NOTE: In land condemnation cases, use the location of the tract of land involved.

. SIGNATURE OF ATTORNEY (OR PRO PER): X *[Signature]* Date 2/08/08

NOTICE TO COUNSEL/PARTIES: The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor implement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3.3 is not filed but is used by the Clerk of the Court for the purpose of statistics, maintaining and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

Key to Statistical codes relating to Social Security Cases:

ATURE OF SUIT CODE	ABBREVIATION	SUBSTANTIVE STATEMENT OF CAUSE OF ACTION
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))

WHA
(PR)CV 08
EXHIBIT INDEX

1082

- 1.) EXHIBIT "A" - JURY VERDICT FIRST DEGREE ATTEMPTED MURDER WITHOUT PREMEDI-
2 TATION ALLEGATION CONVICTION ONE (1) page.
- 3.) EXHIBIT "B" - ABSTRACT OF JUDGMENT CASE No. C-20837 - 2 (two) pages.
- 4.) EXHIBIT "C" - CALJIC 8.67 - 1 page & Record Transcript -RT- 1097-1100:1-
5 2 - 4 (four) pages.
- 6.) EXHIBIT "D" - HABEAS PETITION DENIAL FROM: SAN MATEO SUPERIOR COURT CASE
7 No. SC 20837 - 2 pages; COURT OF APPEAL OF THE STATE OF
CALIFORNIA CASE NO. C038968; IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA CASE NO. S103744 - page.
- 8.) EXHIBIT "E" - CALJIC 8.66 - 1 page.
- 9.) EXHIBIT "F" - 1.) Copy of Hammer's Jury Verdict - with premeditation alle-
10 gation conviction -1 page.
2.) Copy of Kahn's Jury Verdict with premeditation allegation
conviction - 1 page.
3.) Copy of Faatiliga's Jury Verdict with premeditation
allegation conviction - 1 page.
4.) Copy of Smith's Jury Verdict with premditation allegation
conviction - 1 page.
- 14.) EXHIBIT "G" - Copy of Appeal's Affirmed on September 17, 1990 Wende Brief
15 - 8 pages.
- 16.) EXHIBIT "H" - Order Granting Habeas Corpus Case No. 99F06604 Superior
Court for the County of Sacramento 13 pages.
- 17.) EXHIBIT "I" - Cal. Court of Appeal Order February 27, 2007 Case No. 116465
Ordering Respondent Opposition for Writ of mandate.
- 18.) EXHIBIT "J" - Respondent Opposition for Writ of Mandate
- 19.) EXHIBIT "K" - 1st Appellate District Docket - Register of Action
- 20.) EXHIBIT "L" - Court of Appeals April 20, 2007, Letter
- 21.) EXHIBIT "M" - 1st Appellate Court Denied Relief without reason on 3/23/07.
- 22.) EXHIBIT "N" - California Supreme Court Denied Relief without reason on
July 26, 2007. Case No. S153547
- 24.) EXHIBIT "O" - United States Supreme Court Denied Review. Case No. 07-
6191 on October 29, 2007.

25
26
27
28
ORIGINAL

EXHIBIT - A
JURY VERDICT

Page 28 of 90

JUL 25 1989

347

WARREN SLOCUM, County Clerk

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

DEPUTY CLERK

JUL 26 1989

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA)
vs.)
MANUEL ATIENZA WAGAN)
(AKA: MANUEL ATIENZA WAGAN),)
Defendant.)
Plaintiff.)
Dept. 7
No. C-20611
20837
VERDICT

WE, THE JURY IN THE ABOVE ENTITLED CAUSE, find the defendant, MANUEL ATIENZA WAGAN (AKA: MANUEL ATIANZA WAGAN), GUILTY, of the crime of attempted first degree murder in violation of Penal Code section 664/187, as charged in Count I of the Information.

Date: 7.25.89

William S. Walker
FOREMAN

EXHIBIT - B

Abstract of Judgment and all
Petitioner's Jury verdict convictions

Code; and the defendant is NOT a habitual criminal in accordance with Subdivision (c) of that Section.
(is or is not)

(3) IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term of life with possibility of parole provided by law, and that he be remanded to the Sheriff of the County of San Mateo, and by him delivered to the Director of Corrections of the State of California at California State Prisons, San Quentin, CA.

It is ordered that sentences shall be served in respect to one another as follows (concurrently or consecutively as to each count):

For Count 1 vs 664/187-First degree - Life with Possibility of Parole;
for 12022.7PC, an additional 2 years consecutive to Count 1;
for 12022.5PC, an additional 3 years consecutive to Count 1;
for Count 2 vs 245(a)(2)PC and 12022.7PC, sentences are stayed per 654
and in respect to any prior incompletely served sentence(s) as follows (concurrently or consecutively as to all incomplete sentences from other jurisdictions):

(4) To the Sheriff of the County of San Mateo and to the Director of Corrections at the California State Prisons, San Quentin, CA,
pursuant to the aforesaid judgment, this is to command you, the said Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at California State Prisons, San Quentin, CA,
California, at your earliest convenience.

Witness my hand and seal of said court

this 14th day of September, 1989,

WARREN SLOCUM

Clerk,

by _____ Deputy

State of California,

County of San Mateo)

} ss.

I do hereby certify the foregoing to be a true and correct abstract of judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 14 day of September, 1989.

WARREN SLOCUM by:

County Clerk and Ex Officio Clerk of the Superior Court of California in and for the County of San Mateo.

The Honorable

ALLAN J. BOELHOFFER

Judge of the Superior Court of the State of California, in and for the County of San Mateo.

EXHIBIT - C

1. CUSTIC No. 8.67
2. RT-1097-1100:1-2 - 4 pages

ATTEMPT TO COMMIT MURDER--WILLFUL,

282

TO CONSTITUTE WILLFUL, DELIBERATE, AND PREMEDITATED ATTEMPT TO COMMIT
MURDER, THE WOULD-BE SLAYER MUST WEIGH AND CONSIDER THE QUESTION OF KILLING.
HE REASONS FOR AND AGAINST SUCH A CHOICE AND, HAVING IN MIND THE
SEQUENCES, DECIDES TO KILL AND MAKES A DIRECT BUT INEFFECTUAL ACT TO
ANOTHER HUMAN BEING.

THE PEOPLE HAVE THE BURDEN OF PROVING THE TRUTH OF THIS ALLEGATION. IF
YOU HAVE A REASONABLE DOUBT THAT IT IS TRUE, YOU MUST FIND IT TO BE NOT TRUE.

YOU WILL INCLUDE A SPECIAL FINDING ON THAT QUESTION IN YOUR VERDICT,
IN A FORM THAT WILL BE SUPPLIED FOR THAT PURPOSE.

1988)

1 DECLARES TO BE A CRIME, HE IS ACTING WITH GENERAL CRIMINAL
2 INTENT. EVEN THOUGH HE MAY NOT KNOW THAT HIS ACT OR
3 CONDUCT IS UNLAWFUL.

4 HOMICIDE IS THE KILLING OF ONE HUMAN BEING BY
5 ANOTHER. EITHER LAWFULLY OR UNLAWFULLY. HOMICIDE INCLUDES
6 MURDER AND MANSLAUGHTER, WHICH ARE UNLAWFUL, AND THE ACT OF
7 JUSTIFIABLE HOMICIDE WHICH IS LAWFUL.

8 DEFENDANT IS ACCUSED IN COUNT I OF THE
9 INFORMATION OF HAVING COMMITTED THE CRIME OF ATTEMPT TO
10 COMMIT MURDER IN VIOLATION OF SECTIONS 664 AND 187 OF THE
11 PENAL CODE.

12 EVERY PERSON WHO ATTEMPTS TO MURDER ANOTHER HUMAN
13 BEING IS GUILTY OF A VIOLATION OF SECTIONS 664 AND 187 OF
14 THE PENAL CODE.

15 MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING
16 WITH MALICE AFORETHOUGHT. IN ORDER TO PROVE SUCH CRIME,
17 EACH OF THE FOLLOWING ELEMENTS MUST BE PROVED.

- 18 1) A DIRECT BUT INEFFECTUAL ACT WAS DONE BY ONE
19 PERSON TOWARDS KILLING ANOTHER HUMAN BEING AND
20 2) THE PERSON COMMITTING SUCH ACT HARBORED
21 EXPRESS MALICE AFORETHOUGHT, NAMELY, A SPECIFIC INTENT TO
22 KILL UNLAWFULLY ANOTHER HUMAN BEING.

23 IN DETERMINING WHETHER OR NOT SUCH AN ACT WAS
24 DONE, IT IS NECESSARY TO DISTINGUISH BETWEEN MERE
25 PREPARATION ON THE ONE HAND AND THE ACTUAL COMMENCEMENT OF
26 THE DOING OF THE CRIMINAL DEED ON THE OTHER. MERE

1 PREPARATION, WHICH MAY CONSIST OF PLANNING THE KILLING OR
2 OF DEVISING, OBTAINING OR ARRANGING THE MEANS FOR ITS
3 COMMISSION IS NOT SUCH TO CONSTITUTE AN ATTEMPT.

4 HOWEVER, ACTS OF A PERSON WHO INTENDS TO KILL
5 ANOTHER PERSON WILL CONSTITUTE AN ATTEMPT WHERE THOSE ACTS
6 CLEARLY INDICATE A CERTAIN UNAMBIGUOUS INTENT TO KILL.
7 SUCH ACTS MUST BE AN IMMEDIATE STEP IN THE PRESENT
8 EXECUTION OF THE KILLING, THE PROGRESS OF WHICH WOULD BE
9 COMPLETED UNLESS INTERRUPTED BY SOME CIRCUMSTANCES NOT
10 INTENDED IN THE ORIGINAL DESIGN.

11 ~~*****~~ IT IS ALSO ALLEGED IN COUNT I OF THE INFORMATION
12 THAT THE CRIME ATTEMPTED WAS WILLFUL, DELIBERATE AND
13 PREMEDITATED MURDER.

14 IF YOU FIND THE DEFENDANT GUILTY OF ATTEMPT TO
15 COMMIT MURDER, YOU MUST DETERMINE WHETHER THIS ALLEGATION
16 IS TRUE OR NOT TRUE.

17 QUOTE, "WILLFUL," END QUOTE MEANS INTENTIONAL.

18 QUOTE, "DELIBERATE," END QUOTE MEANS FORMED OR
19 ARRIVED AT OR DETERMINED UPON AS A RESULT OF CAREFUL
20 THOUGHT AND WEIGHING OF CONSIDERATIONS FOR AND AGAINST THE
21 PROPOSED COURSE OF ACTION.

22 ~~*****~~ QUOTE, "PREMEDITATED," END QUOTE MEANS CONSIDERED
23 BEFOREHAND. IF YOU FIND THAT THE ATTEMPT TO COMMIT MURDER
24 WAS PRECEDED AND ACCOMPANIED BY A CLEAR, DELIBERATE INTENT
25 TO KILL WHICH WAS THE RESULT OF DELIBERATION AND
PREMEDITATION, SO THAT IT MUST HAVE BEEN FORMED UPON

1 PREEEXISTING REFLECTION AND NOT UNDER SUDDEN HEAT OF PASSION
2 OR OTHER CONDITION PRECLUDING THE IDEA OF DELIBERATION, IT
3 IS ATTEMPT TO COMMIT WILLFUL, DELIBERATE AND PREMEDITATED
4 MURDER.

5 THE LAW DOES NOT UNDERTAKE TO MEASURE IN UNITS OF
6 TIME THE LENGTH OF THE PERIOD DURING WHICH THE THOUGHT MUST
7 BE PONDERED BEFORE IT CAN RIPEN INTO AN INTENT TO KILL
8 WHICH IS TRULY DELIBERATE AND PREMEDITATED. THE TIME WILL
9 VARY WITH DIFFERENT INDIVIDUALS AND UNDER VARYING
10 CIRCUMSTANCES.

11 THE TRUE TEST IS NOT THE DURATION OF TIME BUT
12 RATHER THE EXTENT OF THE REFLECTION.

13 A COLD, CALCULATED JUDGMENT AND DECISION MAY BE
14 ARRIVED AT IN A SHORT PERIOD OF TIME BUT A MERE
15 UNCONSIDERED AND RASH IMPULSE, EVEN THOUGH IT INCLUDES AN
16 INTENT TO KILL, IS NOT DELIBERATION AND PREMEDITATION.

17 TO CONSTITUTE WILLFUL, DELIBERATE AND
18 PREMEDITATED MURDER, ATTEMPT TO COMMIT MURDER, THE WOULD BE
19 SLAYER MUST WEIGH AND CONSIDER THE QUESTION OF KILLING AND
20 THE REASONS FOR AND AGAINST SUCH A CHOICE AND HAVING IN
21 MIND THE CONSEQUENCES BESIDES TO KILL AND MAKES A DIRECT
22 BUT INEFFECTUAL ACT TO KILL ANOTHER HUMAN BEING.

THE PEOPLE HAVE THE BURDEN OF PROVING THE TRUTH
OF THIS ALLEGATION. IF YOU HAVE A REASONABLE DOUBT THAT IT
IS TRUE, YOU MUST FIND IT TO BE NOT TRUE.

 YOU WILL INCLUDE A SPECIAL FINDING ON THAT

1 QUESTION IN YOUR VERDICT USING A FORM THAT WILL BE SUPPLIED
2 FOR THAT PURPOSE. *

3 ATTEMPTED MURDER OF THE SECOND DEGREE IS THE
4 ATTEMPTED UNLAWFUL KILLING OF A HUMAN BEING WITH EXPRESS
5 MALICE AFORETHOUGHT WHEN THERE'S MANIFESTED A SPECIFIC
6 INTENTION TO KILL UNLAWFULLY A HUMAN BEING, BUT THE
7 EVIDENCE IS INSUFFICIENT TO ESTABLISH DELIBERATION AND
8 PREMEDITATION.

9 THE CRIME OF ATTEMPTED VOLUNTARY MANSLAUGHTER IS
10 THE ATTEMPTED UNLAWFUL KILLING OF A HUMAN BEING WITHOUT
11 MALICE AFORETHOUGHT.

12 EVERY PERSON WHO ATTEMPTS UNLAWFULLY TO KILL
13 ANOTHER HUMAN BEING WITHOUT MALICE AFORETHOUGHT BUT WITH AN
14 INTENT TO KILL IS GUILTY OF ATTEMPTED VOLUNTARY
15 MANSLAUGHTER.

.6 THERE IS NO MALICE AFORETHOUGHT IF THE ATTEMPTED
7 KILLING OCCURRED UPON A SUDDEN QUARREL OR HEAT OF PASSION
8 OR IN THE HONEST BUT UNREASONABLE BELIEF IN THE NECESSITY
9 TO DEFEND ONE'S SELF OR FAMILY AGAINST IMMINENT PERIL TO
10 LIFE OR GREAT BODILY INJURY.

IN ORDER TO PROVE SUCH CRIME, EACH OF THE
FOLLOWING ELEMENTS MUST BE PROVED:

- 1) AN ATTEMPT WAS MADE TO KILL A HUMAN BEING.
- 2) THE ATTEMPTED KILLING WAS UNLAWFUL, AND;
- 3) THE ATTEMPTED KILLING WAS DONE WITH THE
INTENT TO KILL.

EXHIBIT # D

COPY OF HABEAS PETITION DENIAL SHEET

- 1.) San Mateo Superior Court Case No. SC 20837
2 pages.
- 2.) California Court of Appeal Case no. CO38968
1 page.
- 3.) In the Supreme Court Of California Case no.
S103744 - 1 page.

1
2
3
FILED
4 SAN MATEO COUNTY
5

JUN 13 2001

6
7
8 Clerk of the Superior Court
9 By Darlene English
10 DEPUTY CLERK
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

In re:) Case No. SC 20837 A
MANUEL A. WAGAN) HC-1304
On Habeas Corpus.) ORDER OF DENIAL

To: Petitioner, Manuel A. Wagan.

The Court has received and reviewed the Petition for Writ of Habeas Corpus of Petitioner, Manuel A. Wagan. The petition is hereby denied.

Introduction

Petitioner filed several previous petitions for writ of habeas corpus with this court. All have been denied.

Petitioner makes no attempt to explain why his claims were not brought out in an earlier petition.

Discussion

3 "Before considering the merits of a second or successive
4 petition, a California court will first ask whether the failure
5 to present the claims underlying the new petition in a prior
6 petition has been adequately explained, and whether that
7 explanation justifies the piecemeal presentation of the
8 petitioner's claims." *In Re Clark* (1993) 5 Cal. 4th 750, 774.

9 The claims contained in the instant petition could have
10 been brought out upon appeal or at the time of the earlier
11 petition.

12 "In this state a defendant is not permitted to try out his
13 contentions piecemeal by successive proceedings attacking the
14 validity of the judgment against him." *In re Clark* (1993) 5
15 Cal. 4th 750, 768 (citing *In re Connor* (1940) 16 Cal. 2d 701,
16 705).

Therefore the court will not grant the instant petition.

Disposition

The Petition for Writ of Habeas Corpus is therefore DENIED.

JUN 12 2001

DATED:

~~Stephen M. Hall~~
Presiding Judge, Criminal

Court of Appeal of the State of California

IN AND FOR THE
THIRD APPELLATE DISTRICT

FILED

AUG - 9 2001

COURT OF APPEAL-THIRD DISTRICT
DEENA C. TRUJILLO, Clerk
BY _____ Deputy

In re MANUEL A. WAGAN on Habeas Corpus.

C038968
Kings County
No.

BY THE COURT:

The petition for writ of habeas corpus is denied.

Dated: August 9, 2001

SCOTLAND, P.J.

cc: See Mailing List

S103744

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
F I L E D

In re MANUEL WAGAN on Habeas Corpus

MAY - 1 2002

Frederick K. Gershich Clerk
Gershich
DEPUTY

Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal.4th 750 ; *In re Miller* (1941) 17 Cal.2d 734.)


Chief Justice

EXHIBIT - E
C-11JIC No. 8.66

PENDANT IS ACCUSED IN COUNT I OF THE INFORMATION OF HAVING
ED THE CRIME OF ATTEMPT TO COMMIT MURDER, IN VIOLATION OF SECTIONS
187 OF THE PENAL CODE.

EVERY PERSON WHO ATTEMPTS TO MURDER IS BEING IS GUILTY OF A
ON OF SECTIONS 664 AND 187 OF

MURDER IS THE UNLAWFUL KILLING OF A HUMAN BEING WITH MALICE AFORETHOUGHT.

IN ORDER TO PROVE SUCH CRIME, EACH OF THE FOLLOWING ELEMENTS MUST BE

A DIRECT BUT INEFFECTUAL ACT WAS DONE BY ONE PERSON TOWARDS KILLING
HUMAN BEING; AND

THE PERSON COMMITTING SUCH ACT HARBORED EXPRESS MALICE AFORETHOUGHT,
A SPECIFIC INTENT TO KILL UNLAWFULLY ANOTHER HUMAN BEING.

DETERMINING WHETHER OR NOT SUCH AN ACT WAS DONE, IT IS NECESSARY TO
DISTINGUISH BETWEEN MERE PREPARATION, ON THE ONE HAND, AND THE ACTUAL
ELEMENT OF THE DOING OF THE CRIMINAL DEED, ON THE OTHER. MERE PREP-
ARATION, WHICH MAY CONSIST OF PLANNING THE KILLING OR OF DEVISING, OBTAINING
AND ARRANGING THE MEANS FOR ITS COMMISSION, IS NOT SUFFICIENT TO CONSTITUTE AN
ATTEMPT. HOWEVER, ACTS OF A PERSON WHO INTENDS TO KILL ANOTHER PERSON WILL
CONSTITUTE AN ATTEMPT WHERE THOSE ACTS CLEARLY INDICATE A CERTAIN, UNAMBIGUOUS
INTENTION TO KILL. SUCH ACTS MUST BE AN IMMEDIATE STEP IN THE PRESENT EXECUTION
OF THE KILLING, THE PROGRESS OF WHICH WOULD BE COMPLETED UNLESS INTERRUPTED
BY CIRCUMSTANCES NOT INTENDED IN THE ORIGINAL DESIGN.

EXHIBIT *- F

- I) Copy of Hammer's Jury Verdict
- 2) Copy of Kahn's Jury Verdict
- 3.) Copy of Faatiliga's Jury Verdict.
- 4.) Copy of Smith's Jury Verdict.

In the Superior Court of the State of California
In and For the County of Sacramento

The People of the State of California

VS.

JEREMIAH GENE HAMMER

FILED
DEC 20 1996
J. J. J. Clerk

CASE NUMBER 96FD3016

DEPT. NUMBER 10

COUNT ONE

We, the Jury in the above entitled cause, find the Defendant, JEREMIAH GENE HAMMER, GUILTY of the crime of violation of Section 664/187(a) of the Penal Code of the State of California (ATTEMPTED MURDER) as charged in Count One of the Information.

We, the Jury in the above entitled cause, find that Defendant, JEREMIAH GENE HAMMER, DID DID NOT commit this crime willfully and with premeditation and deliberation.

We, the Jury in the above entitled cause, find the allegation that in the commission and attempted commission of the above offense(s), the Defendant, JEREMIAH GENE HAMMER, personally used a deadly and dangerous weapon, to wit, a knife, said use not being an element of the above offense, within the meaning of Penal Code Section 12022(b) to be

TRUE NOT TRUE

We, the Jury in the above entitled cause, find the allegation that in the commission of the above offense(s), the said defendant, JEREMIAH GENE HAMMER, personally inflicted great bodily injury upon LAKISHA OATES, not an accomplice to the above offense, within the meaning of Penal Code Section 12022.7 to be

TRUE NOT TRUE

DATED: 11/20/96


FOREMAN

142

CR 19

DEPT. SCJ

8-7-91
DORABLE:
GARY BAHN
M. SMITH

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JUDGE
Deputy Sheriff

T. DOYLE
P. HARRIS

Deputy Clerk
Reporter

TA011638

(Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA Counsel for People:
VS DEPUTY DISTRICT ATTY: D. COLE
01 KAEN ANTOINE REGINALD BY M. SANTOS
664/187.A 01 CT 246 01 CT
Counsel for Defendant: J. WEIL DPD

NATURE OF PROCEEDINGS JURY TRIAL REMANDED 3-27-91

Jury deliberations resume from August 6, 1991 with all parties present as heretofore.

At 9:45 a.m., the Jury reaches a verdict. The Court orders the verdict sealed until 1:45 p.m. At 1:45 p.m., the Jury returns into the court with the following verdicts:

"TITLE OF COURT AND CAUSE"

"We the Jury in the above entitled action, find the Defendant, ANTOINE KAHN, guilty of the crime of ATTEMPTED MURDER, in violation of PENAL CODE SECTION 664/187(a), a Felony, as charged in Count 1.

We further find that the crime attempted was willful, deliberate, and premeditated attempted murder. TRUE.

We further find that in the commission and the attempted commission of the above offense, the said defendant, ANTOINE KAHN, personally used a firearm within the meaning of Penal Code Sections 1203.06(a)(1) and 12022.5. TRUE.

This 7th day of August 1991, Neil W. Marshall, Foreman."

"TITLE OF COURT AND CAUSE"

"We the Jury in the above-entitled action, find the Defendant, ANTOINE KAHN, guilty of the crime of SHOOTING AT AN INHABITED DWELLING, in violation of PENAL CODE SECTION 246, a Felony, as charged in Count 2.

This 5th day of August 1991, Neil W. Marshall, Foreman."

The verdict is read. The Jury is polled. All jurors answer in the affirmative. The verdict is recorded; re-reading as recorded is waived. The Jury is thanked and discharged. Instructions given and all verdict forms submitted to the jury are filed.

The defendant is referred to the Probation Department. Probation and sentence is set for September 6, 1991 at 8:30 a.m. in this department.

Due to the Exhibit Custodian policy, People's exhibit 6 (lab envelope containing 6 vials from gun residue tests) are returned to the People. Deputy District Attorney, M. Santos accepting on behalf of her office.

MINUTES ENTERED

8-7-91
COUNTY CLERK

11, 27, 57

REMANDED
MINUTE ORDER

EX- - 00052

F. I. L. E. D.
KENNETH E. MARTONE
Clerk of the Superior Court

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

TAELIENIU FAATILIGA

Defendant(s)

Department D

FEB 14 1996

No. SCN027539 By: M. KROONA, Deputy
P64850

VERDICT

We, the jury in the above entitled cause, find the defendant, TAELIENIU FAATILIGA,

Guilty _____ of the crime of ATTEMPTED MURDER, in violation of Penal
GUILTY / NOT GUILTY

Code section 664\187(a), as charged in Count One of the Information.

We, the jury further find it True _____ that the above offense was will-
TRUE / NOT TRUE
full, deliberate, and premeditated, within the meaning of Penal code section 189.

We, the jury further find that in the commission of the above offense the defendant

Did _____ personally use a firearm, to wit: a semi-automatic handgun, within the
DID / DID NOT
meaning of Penal Code section 12022.5(a).

We, the jury further find that in the commission of the above offense the defendant, with the
intent to inflict such injury Did _____ personally inflict great bodily injury upon
DID / DID NOT
another, not an accomplice, within the meaning of Penal Code section 12022.7(a)_____

Dated 2.16.96

Presiding foreman's
name is
redacted.

VERDICT

00279

DEPT. 104

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date:

HONORABLE:

APRIL 26 1991
GEORGE TRAMMELL
S. PIEL

JUDGE

Deputy Sheriff

G. JOHNSON

P. CUNEO/A. PAUL

Deputy Clerk
Reporter

SA002825

(Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA

Counsel for People:

VS

DEPUTY DISTRICT ATTY: D. MYERS DDA ✓

01 SMITH GAYLORD ✓

02 SUMLIN, KRISS ERIC ✓

211 06CTS 664/187.A 01CT 664/211 01CT

Counsel for Defendant:

M. ZIMBERT PVT. ✓

V. SOLERNO PVT. ✓

NATURE OF PROCEEDINGS

JURY TRIAL

REM

4-27-90 (01)

8-17-90 (02)

"TITLE OF COURT AND CAUSE"

We, the Jury in the above-entitled action, find the Defendant GAYLORD RICKY SMITH guilty of the crime of ATTEMPTED MURDER, in violation of Penal Code Section 664/187(a), a Felony, as charged in Count 8 of the information.

We further find the allegation that the Attempted Murder was Willful, Deliberate, and Premeditated to be TRUE
(TRUE) OR (NOT TRUE)

We further find the allegation that in the commission and attempted commission of the above offense, the said defendant, GAYLORD RICKY SMITH personally used a firearm within the meaning of Penal Code Sections 1203.06(a)(1) and 12022.5 to be TRUE
(TRUE) OR (NOT TRUE)

We further find the allegation that in the commission of the above offense, said defendant GAYLORD RICKY SMITH, with intent to inflict such injury, personally inflicted great bodily injury upon Carroll Adams, within the meaning of Penal Code Section 12022.7 to be TRUE
(TRUE) OR (NOT TRUE)

THIS 25TH DAY OF APRIL 1991, DAVID MORABITO, FOREPERSON

PAGE 5 OF 8
MINUTE ORDERMINUTES ENTERED
4-26-91
COUNTY CLERK

EXHIBIT A 51

EXHIBIT - G
§ 740. — Copy of Appeal's Affirmed on September 17, 1990

**NOT TO BE PUBLISHED
IN OFFICIAL REPORTS**

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED

SEP 17 1990

THE PEOPLE,

Court of Appeal - First App. Dist.
RON D. BARROW

Plaintiff and Respondent,

By _____
DEPUTY

v.

A047288

MANUEL ATIENZA WAGAN,

(Super. Ct. No. C-20837
San Mateo County)

Defendant and Appellant.

Appellant's counsel has filed an opening brief in which he raises no issues and asks this court for an independent review of the record as required by People v. Wende (1979) 25 Cal.3d 436.

Appellant was charged with attempted first degree murder (Pen. Code, §§ 664/187),^{1/} and assault with a deadly weapon (§ 245, subd. (a)(2)). It was further alleged that appellant used a firearm and inflicted great bodily injury (sentencing enhancements pursuant to §§ 12022.5, 12022.7) in the commission of both offenses. The jury found appellant guilty as charged and found all the enhancements to be true. The court sentenced appellant to life imprisonment for attempted murder, and enhanced the sentence by two years for

^{1/} Unless otherwise indicated, all further statutory references are to the Penal Code.

use of the firearm (§ 12022.5), and by three years for the infliction of great bodily injury (§ 12022.7). Sentence on the second offense was stayed pursuant to section 654. The court granted appellant 543 days total presentence credit and ordered him to pay a \$500 restitution fine.

In September of 1988, appellant and his family and Wallace Garrett and his family were neighbors living across the hall from one another on the upstairs floor of a fourplex at 879 Bellevue in Daly City. The two families had previously gotten along. On September 7, 1988, Garrett received a call from his wife asking him to come home. Mrs. Garrett stated that appellant and Mrs. Wagan had angrily ordered Mrs. Garrett to move her car from a parking space in the building's garage. When Mr. Garrett returned home he was confronted by Mrs. Wagan, who screamed racial epithets and spat at him. Mr. and Mrs. Garrett discussed the incident and decided to call the police, because once before Mr. Garrett had been wrongly accused of assault by a woman with whom he had a verbal altercation. That same day the Garretts were getting into their car when Mr. Garrett saw appellant. Mr. Garrett decided to speak to appellant and smooth things out. Appellant became agitated and said he was going to sue Mr. Garrett. The next day the Garretts noticed new scratches on their vehicle. Mr. Garrett did not have any further arguments with the Wagans until the day of the incident.

On September 18, Mr. Garrett went downstairs to speak to a friend. Because he left his apartment without his keys,

Mr. Garrett left a locking security gate to the apartment building open. Appellant came home and went up the stairs, closing the security gate. Mr. Garrett asked appellant to open the gate, explaining that he had no keys. Appellant shouted "Fuck you" and walked upstairs. Mr. Garrett was forced to yell up to his wife to drop his house keys out their apartment window.

Mr. Garrett eventually walked upstairs to his apartment and was about to go in when he heard "Hey, asshole" shouted from behind. He turned and saw appellant standing in the crack of appellant's partially opened apartment door. Mr. Garrett yelled back "You're an asshole." Appellant opened his door and pointed a silver pistol at Mr. Garrett. Mr. Garrett fled down the stairs. Before he could make the first landing, appellant shot him in the right leg. Mr. Garrett continued down the stairs and attempted to get away through the garage door. He turned to see where appellant was, and was shot by appellant in the face or neck. Mr. Garrett was able to run out the building gate and down the street to the next apartment complex. He tried but could not open the complex's security gate. When he turned around, appellant was standing in front of him. Appellant shot him in the lower abdomen and Mr. Garrett stumbled to the ground. Appellant stood over him and said, "I'm gonna kill you nigger." Appellant then shot Mr. Garrett at least twice more. Mr. Garrett remembered that appellant then left briefly, returned, and shot him again. In all, Mr. Garrett was shot eight times; once in each thigh, once

in the left hand which fractured his wrist, the left elbow, the left side of the neck, the cheek which fractured his jaw, the lower abdomen and the head. The bullet to the head lodged just under the scalp and caused the brain to swell. Mr. Garrett underwent surgery and remained in hospital for two and one-half weeks. At the time of trial, Mr. Garrett had not yet returned to work and was having problems walking.

The prosecution called six neighbors who witnessed the shooting. They all saw appellant shooting an unarmed Mr. Garrett at point blank range. Two neighbors heard appellant yell that he was going to kill Mr. Garrett. Several neighbors verified that at one point appellant left the wounded victim lying on the ground, then returned and shot him again.

Appellant was arrested as he drove away from the scene. Police officers found a .45 caliber pistol and a loaded clip for the weapon in the center console of appellant's car. Another fully loaded magazine for the pistol was found in appellant's front pocket. The shells and the bullet fragments found at the scene were found to have been fired from the pistol recovered from appellant's vehicle.

Defense Case

Edna Wagan, appellant's wife, began to have run ins with Mr. Garrett a few weeks before the incident, when appellant was working in Los Angeles. Mrs. Wagan had borrowed her sister-in-law's car and had parked it in the apartment building's garage. Mr. Garrett drove into the garage abruptly and almost killed Mrs. Wagan. He shouted, "Don't ever park

this car, damn fucking car here." About an hour later Mrs. Wagan returned to her sister-in-law's vehicle and saw that it had a flat tire. Mrs. Wagan called Los Angeles and reported the incident to her husband.

On September 7, Mrs. Wagan saw one of the Garrett's cars parked in her designated space. She asked Mrs. Garrett to move the car. Mrs. Garrett stated that the car belonged to her husband and that she didn't want to move it. Appellant, who had recently returned from Los Angeles, then went to Mrs. Garrett and asked her to please have her husband move the car as soon as he returned home. Later that afternoon, Mrs. Wagan's grandfather came by the apartments. Mr. Garrett drove up to the building and was impeded from entering the garage by the grandfather's car. While Mrs. Wagan stood by her grandfather's vehicle talking to him, Mr. Garrett walked up and screamed, "Move your damn fucking car." Mr. Garrett grabbed Mrs. Wagan near the jaw and she screamed. Mrs. Wagan walked up the stairs to her apartment with Mr. Garrett following her. Mr. Garrett barged into the Wagan's apartment and grabbed Mrs. Wagan by the throat. While he was choking her, he yelled, "Where's your damn fucking husband." Mr. Garrett shook Mrs. Wagan and threw her down. He then left the apartment. Mrs. Wagan yelled at Mr. Garrett that she would report the incident to the police and sue him. She then reported the entire incident to her husband.

The next day, Mrs. Wagan saw Mr. Garrett in the apartment building's laundry room. He told her, "You little

Flip. You put yourself into trouble and you gonna be dead meat. You're fucking Flip." Mrs. Wagan was so frightened she took her baby and fled to a neighbor's home. There she called 911 and reported the incident. She also called her husband and he, too, called the police. When appellant returned home that day, Mr. Garrett accosted him and said, "I can do anything to you, to your family."

The day after the incident in which Mr. Garrett burst into the Wagan's apartment, appellant gave his wife a .45 caliber pistol, which normally he kept in the bedroom. Appellant felt his wife was near to having a nervous breakdown because of Mr. Garrett's threats.

On September 18, Mrs. Wagan drove her husband home from his work. Mrs. Wagan told appellant that the pistol was in the glove compartment. When the couple arrived home, appellant gathered the gun and two clips from the glove compartment along with the couple's baby and the baby's belongings. Appellant started toward the building's stairs, when he noticed a car with someone inside waiving a fist at him. Appellant recognized Mr. Garrett sitting next to a large Black male, whom he did not recognize. Appellant rushed through the security gate and closed it behind him. Mr. Garrett yelled, "You mother fucking asshole. You fucking Flip open the door." Appellant and his family ran into the building and appellant heard Mr. Garrett scream, "You're dead. You wait for me there." Appellant was terrified and rushed his family into their apartment. Appellant's family sat down to dinner

and appellant put the pistol and two clips down on the dining table. The family had just begun to eat, when Mr. Garrett started pounding on the apartment's door. He yelled, "You're dead, mother fucking Flip." Appellant had no phone to call for help and became more terrified. Without thinking, appellant picked up the gun and opened the door. Mr. Garrett seemed to be moving toward the interior of the Wagan's apartment. Appellant instinctively fired the pistol. Mr. Garrett ran down the stairs and appellant fired again. Appellant ran down the stairs and saw that the garage was open. He was terrified of Mr. Garrett and was unsure if the other man he had seen previously with Mr. Garrett in the car was lurking there in the dark. Suddenly, Mr. Garrett moved right in front of appellant. Without realizing what he was doing, appellant shot Mr. Garrett several times. Mr. Garrett fell to the ground and appellant stopped firing. He went back to his apartment and realized he had to notify the authorities. He decided to go to his sister's home. Appellant took out the empty clip from the pistol and reloaded with a full clip. He then went downstairs. When he got to the garage, he saw Mr. Garrett rising from the pavement. Again, he instinctively fired. Appellant then got into his car and was driving to get help when he was stopped by the police.

Substantial evidence supports the jury's verdict.

The jury was properly instructed.

There was no error in the sentencing process or in the sentence.

There are no arguable issues which require further briefing.

The judgment is affirmed.

Benson, J.

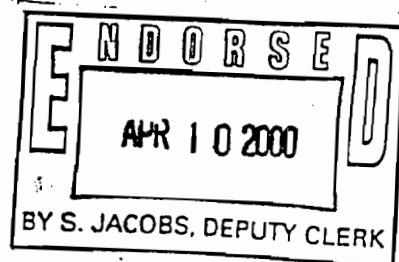
We concur:

Kline, P.J.

Smith, J.

8.) EXHIBIT "H" - Order Granting Habeas Corpus Case No. 99F06604
Superior Court County of Sacramento

1 Timothy
2 Johnson
3
4
5
6
7
8



9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SACRAMENTO

11 In re
12 THOMAS SIMS,
13 On Habeas Corpus.

14 No. 99F06604 Dept. 16

15 ORDER GRANTING HABEAS CORPUS
16 April 10, 2000

17 TO: WARDEN GAIL LEWIS, PLEASANT VALLEY STATE PRISON;
18 JAMES NIELSEN, CHAIRMAN OF THE BOARD OF PRISON TERMS;
19 THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA;
20 RICHARD DUDEK, ATTORNEY FOR PETITIONER

21 The above-named person, an inmate at Pleasant Valley State
22 Prison, Coalinga, California, filed a petition for writ of habeas
23 corpus in this court on August 16, 1999, seeking declaratory
24 relief that 15 Cal. Code Reg. §§ 2400-2411 are invalid insofar as
25 they refer to "attempted first degree murder," a noncrime in
26 California.

27 As will be discussed below, the court has concluded that
28 petitioner is entitled to the relief sought.

1 Penal Code § 664, if a defendant is convicted of attempt to
2 commit a willful, deliberate, and premeditated murder as defined
3 in Penal Code § 189, the sentence is life with parole. The BPT
4 explained that an attempted murder that is willful, deliberate,
5 and premeditated, had it been completed, would have constituted
6 first degree murder, and that the BPT applies the matrix of first
7 degree murders to attempted murders that were willful,
8 deliberate, and premeditated. The BPT noted that Bright held
9 that attempted murder may not be divided into degrees, but that
10 this does not affect the regulations.
11

12 THE PETITION
13

14 Petitioner then filed the instant petition, in which he
15 claims that the regulations should be changed.

16 Penal Code § 664 provides for punishment for attempted
17 murder, as follows:

18 (1) Attempted murder -- five, seven, or nine years.

19 (2) Attempted murder that is willful, deliberate, or
20 premeditated -- life with parole (meaning 7 years to life).

21 (3) Attempted murder of a peace officer or firefighter --
22 life with parole (meaning 7 years to life).

23 (4) Attempted murder of a peace officer or firefighter that
24 was also willful, deliberate, and premeditated -- 15 years to
25 life.

26 In Bright, the California Supreme Court clearly held that
27 there is no such crime as "attempted first degree murder."

1 challenge their validity. His petition for writ of habeas corpus
2 is construed, then, to be a challenge to their validity (see In
3 re Davis (1979) 25 Cal.3d 384 [habeas corpus is proper for
4 obtaining declaratory relief].

5 Further, this is an important issue that affects a large
6 number of prisoners. For this reason, habeas corpus appears to
7 be a proper avenue.

8

9 ORDER TO SHOW CAUSE

10 An order to show cause was issued by Judge Tocherman on
11 September 15, 1999, requiring the parties to address the
12 following issues:

13 (1) The validity of the term "attempted first degree
14 murders" in 15 Cal. Code Reg. §§ 2400-2411, in light of the
15 California Supreme Court decision in People v. Bright (1996) 12
16 Cal.4th 652.

17 (2) The differences in punishment under Penal Code § 664 for
18 attempted murder, attempted murder that is willful, deliberate,
19 and premeditated, attempted murder of a peace officer or
20 firefighter, and attempted murder of a peace officer or
21 firefighter that is willful, deliberate, and premeditated, and
22 whether persons convicted of any such crimes are currently
23 subject to 15 Cal. Code Reg. §§ 2400-2411.

24 Upon request of petitioner, Richard Dudek was appointed
25 counsel for petitioner on November 8, 1999.
26

1 term, (2) attempted willful, deliberate, and premeditated murder
2 is punishable by life imprisonment with possibility of parole,
3 (3) attempted murder of a peace officer or a firefighter is
4 punishable by life imprisonment with possibility of parole, and
5 (4) attempted murder of a peace officer or a firefighter, when
6 willful, deliberate, and premeditated, is punishable by 15 years
7 to life in prison.

8 Respondent claims that 15 Cal. Code Reg. §§ 2400-2411 apply
9 to prisoners sentenced to "attempted first degree murders" when
10 the defendant is sentenced to life under Penal Code § 664, which
11 would include all persons convicted of attempted premeditated
12 murder, attempted murder of a peace officer or firefighter, and
13 attempted premeditated murder of a peace officer or firefighter.
14

15

16 TRAVERSE

17 Petitioner filed his traverse on March 10, 2000.

18 Petitioner reiterates his claim that the BPT must eliminate
19 its use of the term "attempted first degree murder."

20 Petitioner urges the court to reject respondent's
21 characterization of the use of "attempted first degree murder" in
22 the regulations as a "shorthand reference." Petitioner claims
23 that the mention of "shorthand reference" in Bright was mere
24 dicta contained in a footnote in that opinion as a rebuttal to
25 the dissent in that case. Rather, petitioner maintains, 15 Cal
26 Code Reg. §§ 2400-2411 should be seen as being in actual conflict
27 with the intent of the Legislature and with the holding
28

1 of interpretation that would allow a "shorthand reference" to be
2 a part of a regulation. Indeed, respondent cites none in support
3 of such a theory.

4 Petitioner maintains that "attempted first degree murder"
5 refers to a noncrime, and does not refer to attempted murder that
6 was willful, deliberate, and premeditated, or any other kind of
7 attempted murder. Therefore, according to petitioner, 15 Cal.
8 Code Reg. §§ 2400-2411 also refer to a noncrime, and do not cover
9 attempted murders that are willful, deliberate, and premeditated.
10

11 Petitioner also makes further argument about what the
12 categories should be in the regulations, for attempted murder
13 that is willful, deliberate, and premeditated. That, however, is
14 beyond the scope of this petition. Rather, this petition attacks
15 only the usage of the term "attempted first degree murder" in the
16 regulations. If this court declares that the term applies to a
17 noncrime, and that the regulations need to be amended to reflect
18 Bright, it is up to the BPT and not this court to promulgate
19 amendments to the regulations that would reflect Bright.
20

21 NEED FOR EVIDENTIARY HEARING

22 There are no material issues of fact in controversy in this
23 case. Nor is there any reason to require petitioner's presence
24 at a hearing on this matter. Therefore, there is no need for an
25 evidentiary hearing, and the court may simply issue an opinion
26 deciding this case within 30 days of the filing of the traverse
27 (see Cal. Rules of Ct., Rule 260(c)). The court, therefore, is
28

1 case.

2 Respondent's argument of a "shorthand reference" is also
3 untenable because the use of "attempted first degree murder,"
4 even if it did refer to a crime, does not refer to all attempted
5 murders that are punishable by life in prison. This is because
6 "attempted murder of a peace officer or firefighter" is not
7 necessarily "attempted first degree murder", as respondent
8 defines that term. Respondent argues that "attempted first
9 degree murder" is shorthand for attempted willful, deliberate,
10 and premeditated murder, which attempted murder of a peace
11 officer or firefighter is not. In addition, murder of a peace
12 officer or a firefighter is not necessarily first degree murder;
13 rather, the crime could be of either the first or the second
14 degree (see, e.g., Penal Code § 190 [providing for punishment for
15 certain second degree murders of a peace officer]). Thus,
16 "attempted murder of a peace officer or firefighter" does not
17 refer to any matter that would indicate an element associated
18 specifically with first degree murder, the way that the words
19 "willful, deliberate, and premeditated" would otherwise invoke.
20 Respondent's theory is faulty, then, in that "attempted murder of
21 a peace officer or firefighter" would not appear to be included
22 in the "shorthand reference" to "attempted first degree murders,"
23 and would not appear at this time to be included in 15 Cal. Code
24 Reg. §§ 2400-2411, even if respondent's theory that the
25 "shorthand reference" to "attempted first degree murder" remains
26 valid in those regulations.
27
28

1 first degree murder," which is not a crime in California.

2

3

4 DATED: 4-7-00

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



Michael G. Virga

JUDGE OF THE SUPERIOR COURT

MICHAEL G. VIRGA

9.) EXHIBIT "I" - Cal. Court of Appeal Ist District Order 2/27/07
Case No. 116465 - Order Respondent Opposition
for Writ of Mandate



DIANA HERBERT
CLERK/ADMINISTRATOR

STATE OF CALIFORNIA
Court of Appeal
OFFICE OF THE CLERK
FIRST APPELLATE DISTRICT
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4712

TELEPHONE
(415) 865-7200
FAX
(415) 865-7209
E-MAIL
first.district@jud.ca.gov

February 27, 2007

Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Re: A116465; Manuel A. Wagan v. Superior Court
(The People, Real Party in Interest)

Dear Counsel:

The People of the State of California are named as real party in interest to the above-captioned writ petition, which has been assigned to Division Two of this court. The court asks that you serve and file points and authorities in opposition to the petition within **10 days** from the date of this letter. The opposition should address all issues raised in the petition. The court has obtained the record on appeal and has confirmed that the verdict forms do not contain a finding that the attempted murder was willful, deliberate, and premeditated.

Take note that if circumstances warrant, the court may issue a peremptory writ in the first instance. (See Code Civ. Proc., § 1088; *Palma v. U.S. Industrial Fasteners, Inc.*, (1984) 36 Cal.3d 171.)

Please direct inquiries to Stacy Wheeler or Imelda Santos, Deputy Clerks at (415) 865-7292.

Very truly yours,
DIANA HERBERT, CLERK

by: **STACY WHEELER**
Deputy Clerk

cc: Manuel A. Wagan

10.) EXHIBIT "J" - Respondent Opposition for Writ of Mandate

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-1342
Facsimile: (415) 703-1234

*Received 3/13/07
2:30 pm.*

March 8, 2007

Ms. Diana Herbert
Clerk, California Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102

RE: *Manuel A. Wagan v. Superior Court* (A116465)
San Mateo County Superior Court No. C-20837
Opposition To Petition For Writ Of Mandate

Dear Ms. Herbert:

Real party in interest hereby opposes the petition for writ of mandate, as requested by this Court's order of February 27, 2007.

On December 14, 1988, the District Attorney of San Mateo County filed an information charging petitioner Manuel A. Wagan with one count of attempted murder, in violation of Penal Code sections 187 and 664. Count 1 specifically alleged that petitioner "did wilfully, unlawfully and feloniously, deliberately and with premeditation and with malice aforethought, attempt to murder WALLACE GARRETT, a human being." (1 CT 5.) The information further charged one count of aggravated assault, in violation of Penal Code section 245, subdivision (a). (1 CT 6.) A jury convicted petitioner of "attempted first degree murder" and aggravated assault. (2 CT 347-350.) The trial court sentenced petitioner to state prison for a five-year determinate term and a consecutive life term. (2 CT 413-414.)

On January 9, 2007, petitioner filed the instant pleading seeking writ of mandate. He claims that the respondent superior court “purported to imposed an illegal life sentence with the possibility of parole under subdivision (a) without convicting petitioner of premeditated attempted murder as required mandatorily by Cal. PC section 664(a).” (Petn. at p. 4.) “Petitioner was never convicted or never admitted guilty of premeditated attempted murder under PC 664(a) and CALJIC 8.67, so, petitioner sentence is illegal.” (Petn. at p. 6.) On February 27, 2007, this Court requested that real party in interest to file opposition.

As a preliminary matter, real party in interest notes that mandate does not lie because petitioner does not challenge a ruling of the superior court. More importantly, petitioner’s precise claim has already been considered and rejected by the California Supreme Court, with citations to *In re Clark* (1993) 5 Cal.4th 750 and *In re Miller* (1941) 17 Cal.2d 734. (Real Party’s Exhibit A.) It is therefore inappropriate for this Court to grant relief by means of peremptory writ on this repetitive petition. (*Hagan v. Superior Court* (1962) 57 Cal.2d 767.)

Considered on the merits, the petition has none. As relevant here, Penal Code section 664, subdivision (a), provides that a defendant convicted of attempted murder is subject to a sentence of life with the possibility of parole if the jury finds that the attempted murder was “willful, deliberate, and premeditated murder, as defined in section 189.” (See also *People v. Bright* (1996) 12 Cal.4th 652, 665.) Unless the jury finds this premeditation allegation to be true, a defendant convicted of attempted murder is subject to a determinate sentence of five, seven, or nine years. (Pen. Code, § 664(a).)

“Like first degree murder, attempted first degree murder requires a finding of premeditation and deliberation.” (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223.) Here, the trial court instructed the jury on willful, deliberate, and premeditated attempted murder, pursuant to CALJIC No. 8.67. (2 CT 281.) The court also instructed the jury on unpremeditated, second degree murder (CALJIC No. 8.30), and gave verdict forms for “attempted second degree murder.” (2 CT 283, 358.) The jury rejected the attempted second degree murder finding, having been instructed that it must unanimously ascertain the degree of the attempted murder. (2 CT 267.) Instead, the jury convicted petitioner of “**attempted first degree murder**,” as

People v. Manuel A. Wagan (A116465)
Opposition To Petition For Writ Of Mandate

Page -3-

stated on the verdict form. (2 CT 347.) Thus, the jury necessarily determined that petitioner's offense was willful, deliberate, and premeditated.

The Court should accordingly deny this repetitious and frivolous petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "DORIAN JUNG".

DORIAN JUNG
Deputy Attorney General
[State Bar No. 200116]

For EDMUND G. BROWN JR.
Attorney General

11.) EXHIBIT "K" - 1st Appellate District Docket - Register of Action

CALIFORNIA APPELLATE COURTS



Case Information

[Welcome](#)**1st Appellate District**[Change court](#)[Search](#)

Court data last updated: 04/20/2007 11:05 AM

[E-mail](#)[Case Summary](#) [Docket](#) [Scheduled Actions](#) [Briefs](#)
[Disposition](#) [Parties and Attorneys](#) [Trial Court](#)[Calendar](#)[Help](#)[Opinions](#)

Docket (Register of Actions)

Wagan v. Superior Court San Mateo**Division 2****Case Number A116465**C|C
home

Date	Description	Notes
01/19/2007	Filed petition for writ of:	
01/19/2007	Request filed to:	appointment of counsel;
02/27/2007	Opposition requested.	10 days
03/02/2007	Filed document entitled:	Petitioner Wagan's "Lodging Proof of Service of Petition for Writ of Mandate/Prohibition"
03/08/2007	Motion filed.	Petitioner Wagan's Motion for Appointment of Counsel and Declaration of Indigency.
03/09/2007	Opposition filed.	
03/22/2007	Reply filed to:	
03/23/2007	Order denying petition filed.	The petition for writ of mandate/request for counsel is denied.
03/23/2007	Case complete.	

[Click here to request automatic e-mail notifications about this case.](#)

© 2004 Judicial Council of California

CALIFORNIA APPELLATE COURTS



Case Information

[Welcome](#)**1st Appellate District**[Change court](#)[Search](#)

Court data last updated: 04/20/2007 11:05 AM

[E-mail](#)[Case Summary](#) [Docket](#) [Scheduled Actions](#) [Briefs](#)
[Disposition](#) [Parties and Attorneys](#) [Trial Court](#)[Calendar](#)[Help](#)[Opinions](#)

Parties and Attorneys

Wagan v. Superior Court San Mateo

Division 2

Case Number A116465

CJC

home

Party	Attorney
Wagan, Manuel A. : Petitioner P.O. Box 9 530-2-23UP Avenal, CA 93204	Pro Per
Superior Court San Mateo : Respondent	
Caif. Atty General : Real Party in Interest	Office of the Attorney General 455 Golden Gate Avenue - Suite 1100 San Francisco, CA 94102

[Click here to request automatic e-mail notifications about this case.](#)

© 2004 Judicial Council of California

12.) EXHIBIT ""L" - Ist Appellate District Court of Appeal
April 20, 2007, Letter



DIANA HERBERT
CLERK/ADMINISTRATOR

STATE OF CALIFORNIA
Court of Appeal
OFFICE OF THE CLERK
FIRST APPELLATE DISTRICT
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4712

TELEPHONE
(415) 865-7200
FAX
(415) 865-7209
E-MAIL
first.district@jud.ca.gov

April 20, 2007

Manuel A. Wagan
E-30055, 530-2-23U
P.O. Box 9
Avenal, CA 93204

RE: A116465 (Manuel A. Wagan v. Superior Court of San Mateo County)

Dear Mr. Wagan:

This letter is in response to your letter dated April 12, 2007, requesting clarification of the March 27, 2007 denial order in your writ proceeding. Specifically, you asked if the denial order was denying the entire writ petition or just your request for appointed counsel, and if the order was this Court's final decision. You also asked that if the denial order was final that your April 12, 2007 letter be considered a notice of rehearing of final judgment.

The March 23, 2007 order denied your writ petition as well as your request for appointed counsel. Since this was a writ proceeding, the denial order was this court's final decision and this court's jurisdiction ended as of the date the order issued.

Sincerely,
A handwritten signature in black ink, appearing to read "Stacy Wheeler".
Stacy Wheeler
Deputy Clerk

13.) EXHIBIT "M" - Ist Appealate Court Denied Relief Witout
Reason on 3/23/07

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FILED
COURT OF APPEAL FIRST APPELLATE DISTRICT

MANUEL A. WAGAN,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
MATEO COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Real Party in Interest.

MAR 23 2007

DIANA BERRYL CLERK

BY _____ DEPUTY CLERK

A116465

(San Mateo County
Super. Ct. No. SC 20837-A)

BY THE COURT:

The petition for writ of mandate/request for counsel is denied.

Dated: MAR 23 2007

KLINE, P. J.

P.J.

Received 3/27/07 - at 6pm.

4/12/07 Send letter request of Rehearing and Clarification of order March 23, 2007.

M. Thursday Friday after 6pm.

4/14/07

14) EXHIBIT "N" - California Supreme Court Denied Relief without reason on July 26, 2007, Case No. S153547.

Court of Appeal, First Appellate District, Div. 2 - No. A117934
S153547

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MANUEL A. WAGAN, Petitioner,

v.

THE SUPERIOR COURT OF SAN MATEO COUNTY, Respondent;

THE PEOPLE, Real Party in Interest.

The petition for review is denied.

Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED

JUL 26 2007

Frederick K. Ohlrich Clerk

DEPUTY

GEORGE

Chief Justice

27
11

15) EXHIBIT "O" - United States Supreme Court Denied Review Case No. 07-61
91 on October 29, 2007.

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

William K. Suter
Clerk of the Court
(202) 479-3011

October 29, 2007

Mr. Manuel A. Wagan
Prisoner ID E-30055
P.O. Box 9
Avenal, CA 93204

Re: Manuel A. Wagan
v. Superior Court of California, San Mateo County
No. 07-6191

Dear Mr. Wagan:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,


William K. Suter, Clerk

1 **BACKGROUND**

2 Petitioner, incarcerated at Pleasant Valley State Prison in
3 Coalinga, California, for a conviction from Los Angeles County
4 Superior Court, brings this habeas petition to attack the Board
5 of Prison Terms' use of the term "attempted first degree murder"
6 in its rules and regulations and in its parole consideration
7 criteria, found at 15 Cal. Code Reg. §§ 2400-2411.

8 Petitioner was convicted of attempted murder, that was found
9 to be willful, deliberate, and premeditated for purposes of
10 increasing the sentence under Penal Code § 664.

12 On August 28, 1998, petitioner sent a letter to the Board of
13 Prison Terms (hereinafter "BPT") in Sacramento, "petitioning"
14 under Gov. Code § 11340.6 for the BPT to adopt, amend, or repeal
15 15 Cal. Code Reg. §§ 2400 through 2411, to change any references
16 to "attempted first degree murder" because there is no such crime
17 (see People v. Bright (1996) 12 Cal.4th 652). Petitioner claimed
18 that he is an interested party, having been convicted of
19 attempted murder that was willful, deliberate, and premeditated,
20 and cannot tell under the current regulations whether his base
21 term under the Matrix of Base Terms is supposed to be one-half of
22 the "first degree murder" matrix term or the "second degree
23 murder" matrix term, for purposes of 15 Cal. Code Reg. § 2403.

25 The BPT, on September 28, 1998, responded to petitioner,
26 denying his petition in whole. The BPT informed petitioner that
27 under Penal Code § 189, all murder that is willful, deliberate,
28 and premeditated is murder of the first degree, and that under

1 Rather, all attempted murders are simply that, "attempted
2 murder," not divided into degrees. A "willful, deliberate, or
3 premeditated" finding does not convert the crime into "attempted
4 first degree murder," but instead provides for an increased
5 punishment provision.

6 Petitioner alleges that 15 Cal. Code Reg. §§ 2400-2411,
7 however, still reflect pre-Bright thinking by some, that certain
8 attempted murders are called "attempted first degree murder." He
9 claims that these regulations erroneously provide criteria and
10 guidelines for prisoners convicted of "attempted first degree
11 murders where the perpetrator is sentenced for life under the
12 provisions of Penal Code Section 664, effective January 1, 1987"
13 (15 Cal. Code Reg. § 2400).

15 As they now stand, the regulations technically appear not to
16 apply to anyone convicted of attempted murder, as there is no
17 such crime of "attempted first degree murder" in California. Nor
18 do the regulations appear to distinguish between attempted
19 murders that were willful, deliberate, and premeditated, and
20 those that were not willful, deliberate, and premeditated but
21 were perpetrated on a ~~peace~~ officer or a firefighter, which also
22 result in life sentences, thereby undercutting the BPT's position
23 in its denial response to petitioner.

24 Petitioner claims that the regulations need to be amended,
25 to reflect Bright. Petitioner is affected by these regulations,
26 having been convicted of attempted murder that was willful,
27 deliberate, and premeditated. Therefore, he has standing to
28

1 RETURN

2 Respondent filed a return on November 1, 1999.

3 In the return, respondent admits that defendant was
4 convicted of willful, deliberate, and premeditated attempted
5 murder.6 Respondent denies that the regulations stand in
7 contravention of law. Respondent also answers the two questions
8 posed by the court in the order to show cause.9 First, respondent claims that "attempted first degree
10 murder," as used in the regulations in question, is not contrary
11 to Bright. Respondent admits that Bright held that the "willful,
12 deliberate, and premeditated" part of attempted murder does not
13 establish a greater degree of attempted murder but instead sets
14 forth a penalty provision for an increased sentence. Respondent,
15 however, claims that the Court in Bright noted that several
16 informal analyses within the history had made reference to
17 "attempted first degree murder" as a "shorthand reference" to an
18 attempt to commit murder that was willful, deliberate, and
19 premeditated. Respondent claims that this "shorthand reference"
20 was used in cases that pre- and post-date the regulations in
21 question. Thus, respondent claims, the regulations also use the
22 term as a "shorthand reference" for an attempted murder that was
23 willful, deliberate, and premeditated.24 Second, respondent claims that Penal Code § 664 prescribes a
25 punishment of: (1) unless provided otherwise, five, seven, or
26 nine years for an attempt to commit a crime that carries a life

1 Bright.

2 Petitioner also points out that the amendment to Penal Code
 3 § 664(a) that created a punishment of life imprisonment with
 4 possibility of parole for "attempted willful, deliberate, and
 5 premeditated murder" created confusion amongst legal scholars,
 6 many of whom concluded that a new greater offense of "attempted
 7 first degree murder" had come into existence. This is what
 8 Bright rejected. 15 Cal. Code Reg. §§ 2400-2411 were adopted in
 9 1988, and did not, at that time, reflect what would become the
 10 holding in Bright, which was decided eight years later. Thus,
 11 the BPT must have subscribed to the belief that a new greater
 12 offense of "attempted first degree murder" had come into
 13 existence. In support, petitioner attaches documentation of
 14 memorandum generated at the time the regulations were adopted,
 15 referring to the crime of "attempted first degree murder" but not
 16 at all to "willful, deliberate, and premeditated." However,
 17 after Bright was decided, the BPT took no action to amend the
 18 regulations to reflect the rejection of that theory in Bright.

20 Petitioner also takes issue with respondent's attempt to
 21 justify the failure of the BPT to amend 15 Cal. Code Reg. §§
 22 2400-2411, to reflect Bright, to save "state printing resources."
 23 Petitioner contends that this rationale is preposterous, and in
 24 any event, the wordiness of the paragraphs containing the
 25 offending language do not evince any desire to "save state
 26 printing resources."

27 Petitioner also claims there is no case, statute, or maxim

1 issuing this opinion without need for ordering an evidentiary
2 hearing.

3

4 CONCLUSION

5 Respondent's position, simply put, is untenable.

6 It is clear that 15 Cal. Code Reg. §§ 2400-2411 were adopted
7 at a time when many scholars believed that a new offense of
8 "attempted first degree murder" had been created by the amendment
9 to Penal Code § 664 that allowed for life imprisonment of a
10 defendant convicted of attempted murder that was willful,
11 deliberate, and premeditated. These scholars were wrong,
12 however, as the California Supreme Court concluded in Bright that
13 no such crime had been created, and that instead the "willful,
14 deliberate, and premeditated" language had created a punishment
15 provision. Since Bright, it has been clear that there is no such
16 crime as "attempted first degree murder" in California. Yet,
17 since Bright, the BPT has made no attempt to amend 15 Cal. Code
18 Reg. §§ 2400-2411 to reflect the decision in Bright. Instead,
19 the BPT continues to utilize outdated language that was found to
20 refer to a noncrime in Bright. *Closing*

21
22 Respondent's argument that the usage of the term is a
23 "shorthand reference" is also untenable. Although the term may
24 have been a "shorthand reference" before the time of Bright, it
25 has been clear since Bright was decided that the usage of such a
26 term is disfavored and refers to a noncrime. Therefore, it
27 should have been deleted from the regulations at issue in this
28

1 Respondent does not address why 15 Cal. Code Reg. §§ 2400-
2 2411 were never changed to reflect Bright, after Bright was
3 decided. Rather, respondent's position appears to be that
4 amendment to the regulations was not necessary because the
5 "shorthand reference," according to respondent, represented a
6 "convenient method of expressing the terms of a crime which
7 otherwise requires a more generous expenditure of state printing
8 resources."

9 Regulations promulgated to reflect the status of the law as
10 it is written, however, cannot be justified in its shortcomings
11 by a desire to limit the "expenditure of state printing
12 resources." Rather, if the law is of a certain status, the
13 regulations must accurately reflect that law, even if it requires
14 "a more generous expenditure of state printing resources."
15 Expense in reprinting materials to reflect the current status of
16 the law should never be used as an excuse to fail to act to amend
17 materials that are outdated and no longer reflect the current
18 status of the law.

19 For these reasons, it is concluded that 15 Cal. Code Reg. §§
20 2400-2411 are invalid insofar as they include the term "attempted
21 first degree murder," which is not a crime in California.
22

23
24 ORDER

25 IT IS THEREFORE ORDERED that the petition for writ of habeas
26 corpus is granted, and that 15 Cal. Code Reg. §§ 2400-2411 are
27 DECLARED INVALID INSOFAR as they include the term "attempted

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(3))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing order granting habeas corpus by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

RICHARD DUDEK
Attorney at Law
819 F Street
Sacramento, CA 95814

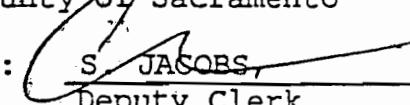
OFFICE OF THE ATTORNEY GENERAL,
STATE OF CALIFORNIA
P.O. Box 944255
Sacramento, CA 94244-2550

WARDEN GAIL LEWIS,
PLEASANT VALLEY STATE PRISON
P.O. Box 8500
Coalinga, CA 93210

JAMES NIELSEN, CHAIRMAN
BOARD OF PRISON TERMS
428 J Street
Sacramento, CA 95814

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: April 10, 2000

Superior Court of California,
County of Sacramento
By: 
S. JACOBS,
Deputy Clerk